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UNITED STATES-PEOPLE'S REPUBLIC OF CHINA NUCLEAR AGREEMENT

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

OCTOBER 9, 1985

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UNITED STATES-PEOPLE'S REPUBLIC OF CHINA NUCLEAR AGREEMENT

WEDNESDAY, OCTOBER 9, 1985

United States Senate,
Committee on Foreign Relations,
Washington, DC.

The committee met at 9:33 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Richard G. Lugar (chairman of the committee) presiding.

Present: Senators Lugar and Evans.

The Chairman. This hearing of the Senate Foreign Relations Committee is now called to order.

Today the committee continues its consideration of the Nuclear Cooperation Agreement with the People's Republic of China.

We have embarked upon a rather extensive examination of all the issues involved because we recognize the committee has an important responsibility to discharge.

Our decision on this agreement will play a key role in United States relations with the People's Republic of China., the rest of Asia, and in our efforts to strengthen the worldwide nonproliferation regime.

Thus, we must consider the agreement in all its political, nonproliferation, legal, and commercial aspects. To do this, we have asked a number of distinguished individuals with a variety of backgrounds to appear before us.

Yesterday, the committee had the opportunity to hear representatives of the administration and the Nuclear Regulatory Commission.

This morning, we will hear from several distinguished Senators who are respected for their expertise in the field of nonproliferation.

This afternoon, we will have with us again representatives of the administration and, finally, a panel of distinguished private citizens.

As you know, a joint session of Congress has been scheduled for this morning to hear the address of Prime Minister Lee Kwan Yew of Singapore. This required rescheduling of all of today's witnesses. Fortunately, because of the cooperation of everyone involved, we have succeeded in doing this without detracting from our original plans for a full hearing on this agreement.

I thank everyone involved for this.

Naturally, running the hearing in two segments may result in some further inconvenience for our witnesses, and I ask for their understanding.

This morning, we plan to hear testimony from Senator John Glenn and Senator William Proxmire. The Senators have been kind enough to shorten their remarks in such a way that both can be heard this morning prior to our recess for the Prime Minister of Singapore.

Senator GLENN. Senator Proxmire will begin promptly at 10 o'clock.

The CHAIRMAN. Senator Glenn, we welcome you to the committee. We apologize for the truncated aspects of our hearings, and we know that we may, in fact, be interrupted by a vote even during this hearing. But I would ask you to proceed.

We are glad to have you with us.

STATEMENT OF HON. JOHN GLENN, A U.S. SENATOR FROM OHIO

Senator GLENN. Thank you very much, Mr. Chairman.

It seems a little strange to be in this particular spot when in this particular room. I used to sit right there [indicating] when I was still on the committee. So this is a little unusual spot for me to be sitting in. But I appreciate, after last night's late night session, your having the hearing this morning and getting us started right on time so that we can get as much in as possible.

We are dealing with some very, very important matters today.

If I had to make an overall precis of my view of the agreement, I would say this: The business potential of this United States/China agreement is excellent. It is very good, but there are not adequate safeguards, and there are other deficiencies and ambiguities in it.

These deficiencies and ambiguities may lead to future, very serious, disagreements. That is what we want to avoid.

In the past, we have seen the People's Republic of China policy at one time favoring proliferation; by their own statements, in favor of proliferation. They now say they are against it, which leaves us in some doubt as to what their policy may be.

Another point is that the deficiencies can be remedied, without reopening this whole agreement for renegotiation. That is the reason we put in the Sino-American Nuclear Verification Act, to take away these ambiguities and possible misunderstandings.

If left as is, the agreement has the potential to become an ongoing irritant in United States-China relations, with a possible reduction in U.S. national security and weakening of the international nonproliferation regime.

I would like to review the provisions of the agreement that I find particularly troubling.

First and foremost, the agreement is completely opaque on the question of verifying peaceful uses of items exported to the People's Republic of China by the United States.

Instead of safeguards, the agreement provides that, "The parties will use diplomatic channels to establish mutually acceptable arrangements for exchanges of information and visits to material, facilities, and components subject to this agreement." In other words, we are only going to use diplomatic channels to talk about what future arrangements might be necessary.

That is hardly satisfactory, going into an international agreement such as this. So, the only verification we will have will be what visits can be arranged. There is no standard provided to enlighten anyone as to what would constitute adequate verification. You may be sure the People's Republic of China will use the competitive posture of the French, for instance, and others, to pressure our negotiators into not demanding very much.

What it means, Mr. Chairman, in essence is the Congress is being asked to review favorably an agreement whose full content will be unknown to us until after the agreement goes into effect. I submit that that is a dangerous erosion of congressional prerogatives which were established in the first place because of dissatisfaction with executive branch performance in nonproliferation activities.

Let me say, Mr. Chairman, that this is not a political matter with me. I was just as adamant on some of these safeguards during the Carter administration. It was during that administration that I was the author of the Nuclear Nonproliferation Act of 1978. So this is not a political matter. It is a matter of safety for the whole world in trying to prevent the spread of nuclear weapons and trying to put in some of the safeguards for anything that goes out of our own country.

The other day, I half-jokingly wrote a little note that said, as in the TV commercials that we see these days, I said that without an agreement such as we were proposing here, no U.S. nuclear material should leave our home without it. I firmly believe that.

We should have adequate standards of verification. If we don't do that, not only do we risk the possibility of substantial crossovers of U.S. exported items from civilian to military activities, but we exacerbate seriously the already strained relationship on nuclear trade matters that exists between nuclear weapon states and nonweapon states.

What message do we send to the 125 nonweapon state signatories to the NPT who are committed to put all their nuclear activities under safeguards, when we sign an agreement on nuclear trade that calls for no safeguards whatsoever on the grounds that the parties are weapon states?

After the NPT went into effect in 1970, it gradually became apparent to the weapon states that their positions were morally and politically indefensible. The gap in safeguards requirements was a factor inducing reluctance on the part of some important industrialized states to sign the NPT. As a result, the United States made a voluntary offer to allow IAEA safeguards on our peaceful nuclear facilities.

Such safeguards, including the inspections that are a part of them, are in place now at selected U.S. facilities.

Similarly, because of their membership in EURATOM and the IAEA/Euratom Agreement, the peaceful nuclear activities of Great Britain and France are subject to safeguards. Even the Soviet Union, as closed a society as exists on this Earth, has made a voluntary offer to allow IAEA safeguards on selected facilities inside her territory.

So, then, why does the United States-China agreement not call for safeguards?

We are told in the statutorily required nuclear proliferation assessment statement, the NPAS, accompanying the agreement and prepared by ACDA, that: "The United States did seek Chinese acceptance of IAEA safeguards on United States supply under the agreement, but the Chinese adamantly refused."

They refused, and we caved in, apparently.

The Japanese did not cave—their nuclear agreement with the Chinese calls for safeguards.

The Argentines did not cave—their nuclear agreement with the People's Republic of China calls for safeguards.

The Brazilians did not cave—their nuclear agreement with the People's Republic of China also calls for safeguards. But apparently we caved in.

The Japanese, the Argentines, the Brazilians get safeguards, and we get "visits" of an undefined nature—because the Chinese were "adamant."

Well, how adamant are they, really? Here is what Ambassador Kennedy said at a hearing on July 31, 1985, before the House Foreign Affairs Committee in explaining the provisions of the agreement. I quote: "This agreement does not provide for International Atomic Energy Agency safeguards in the People's Republic of China. But neither does the agreement foreclose such safeguards, were China to undertake a voluntary offer with the IAEA as the other nuclear weapon states have done."

Well, at the recent IAEA General Conference, the People's Republic of China announced they, too, would join the other weapon states in making a voluntary offer to allow IAEA safeguards on some of their facilities. This was announced after the signing of the agreements with Japan, Argentina, and Brazil, and, therefore, suggests they may indeed be prepared to go further than their obligations under these agreements.

Mr. Chairman, of all the arguments that the administration has advanced thus far to defend its failure to put safeguards arrangements into this agreement, the one that irks me the most is contained in the legal memorandum prepared by the executive branch answering claims that the law requires a guarantee of safeguards. This memorandum says, in part, that we were not under legal obligation to require safeguards, and to back this up, references agreements that we signed 30-years ago that did not contain safeguards.

I think it is the height of tawdriness to suggest that what might have been acceptable nuclear policy in 1955 is acceptable in 1985.

The fact is, there was not even an IAEA 30 years ago, and this is the first nuclear power agreement that we have signed since the IAEA safeguards system became operational in the 1960's that does not contain safeguards requirements.

The bottom line is that regardless of the merits of the arguments concerning legal requirements, as a matter of good policy and protection of our national security, I believe the United States should insist that the verification of peaceful uses for any exported items to the People's Republic of China be covered by IAEA safeguards or their equivalent.

To do less under these circumstances is to take a 30 year backward leap and to let our nonproliferation policy be dictated by short-term considerations that may cause serious trouble for us later.

This brings me to the second area of concern I have regarding the agreement, the exercise of statutorily required U.S. consent rights. The NNPA requires that any new agreement provide the United States with consent rights over various activities, including the further enrichment of U.S.-supplied fuel, the reprocessing of spent fuel of U.S. origin, and the reprocessing of spent fuel that has passed through a U.S. reactor.

The United States-China agreement deals with this issue in article 5(2) in language that is so arcane and convoluted it almost defies belief that both sides could agree on its precise interpretation. In essence, article 5(2) says that whenever the People's Republic of China decides it wants to separate plutonium from spent fuel that has emerged from a United States reactor, and I quote: "The parties will promptly hold consultations to agree on a mutually acceptable arrangement. The parties undertake the obligation to consider such activities favorably." I repeat, "such activities favorably."

Now some people think this language is so biased in the direction of favoring an agreement that there will be very little to negotiate. While I do not quite take it that same way, I do believe we face a possible future situation with the Chinese that is similar in some respects to the situation we have with India over the reprocessing of spent fuel at Tarapur. That dispute has not helped United States-Indian relations, to say the least, and there is no reason why we ought to repeat such uncertainties with the Chinese.

The solution to this is very simple, Mr. Chairman. We simply need to have the Chinese recognize what the State Department says is obvious: That the language of the agreement neither favorably or unfavorably disposes the United States to exercise its consent rights in any particular direction. That is, the language is neutral, and the United States will say yes or no to Chinese requests in accordance with our security and nonproliferation interests at the time.

The deficiencies in the agreement that I have discussed thus far—lack of safeguards, and the possibility of misinterpretation of our consent rights, would be of concern regardless of who the trading partner was, Mr. Chairman. But I think we have reason to have particular concerns in the case of the People's Republic of China because of the history of its relationship with the United States and the history of its policies and practices in the area of nuclear trade.

I need not remind the Foreign Relations Committee, of all committees, that there have been two major political upheavals since the People's Republic of China was established some 36 years ago. So there is the same question about the wisdom of signing 30-year nuclear agreements with a nation that has been undergoing such instabilities.

I also need not remind this committee that after the second Shanghai communique was signed in August 1982, we thought we had struck a deal in which a reduction in arms sales to Taiwan was predicated on the People's Republic of China promise of a peaceful solution to the Taiwan issue. But the day after the communique was signed, Chinese leaders said they had made no such promise. This experience alone suggests the importance of ensuring that Chinese and United States understandings of the agreement are commensurate with each other.

But it is China's nonproliferation policies themselves that may require the most careful scrutiny.

The history of China's nonproliferation policies and activities is not a happy one. On August 16, 1963, in the Peking Review, an official statement contained the following passages:

> Whether or not nuclear weapons help peace depends on who possesses them. It is detrimental to peace if they are in the hands of imperialist countries; it helps peace if they are in the hands of socialist countries. It must not be said indiscriminately that the danger of nuclear war increases along with the increase in nuclear powers. Nuclear weapons in the possession of a socialist country are always a means of defense against nuclear blackmail and nuclear war. So long as the imperialists refuse to ban nuclear weapons, the greater the number of socialist countries possessing them, the better the guarantees of world peace.

I would repeat the last part of that. Referring to nuclear weapons—

> So long as the imperialists refuse to ban nuclear weapons, the greater the number of socialist countries possessing them, the better the guarantee of world peace.

Of course, the statement I quoted from was made before China became a nuclear power herself in 1964, but did that event change her attitude about proliferation of weapons? No, it did not.

In 1966, Chou En Lai stated that the draft Nuclear Nonproliferation Treaty was, "a great conspiracy against all peace loving countries and people." That was the Nonproliferation Treaty.

Up to more recent times, in 1977, the Chinese news agency, Xinnua, described a comprehensive test ban as "a new starting point for another round of the nuclear race. The hegemonic practice of prohibiting the small and medium sized countries from developing their own nuclear weapons can deceive nobody."

In 1981, a Chinese delegate declared to the United Nations Commission on Disarmament that the Comprehensive Test Ban Treaty, "can only tie the hands of those countries wih weaker defense capabilities."

Mr. Chairman, we have seen many newspaper reports in recent years that the Chinese pro-proliferation stance which they had then was backed up by more than words. China was reported as helping Pakistan with the latter's nuclear weapons program, and China was reported to have sent heavy water to Argentina and enriched uranium to South Africa without requiring safeguards.

We are told by the executive branch that Chinese policies have changed.

Last year, a public declaration was made by Premier Zhao Ziyang that, "we, by no means, favor nuclear proliferation nor do we engage in such proliferation by helping other countries to develop nuclear weapons."

The problem with this statement, besides the fact that it was preceded by criticism of the NPT and a reiteration of China's refusal to accede to it, is that not long after it was made, Chinese scientists were reportedly discovered at the Kahuta site in Pakistan which is the site where a clandestine nuclear enrichment plant is reportedly being built—a plant that will have the capability of producing weapons grade highly enriched uranium.

It was that discovery that put this agreement on hold for over a year.

Given this history, should we depend on a written summary prepared by the State Department of subsequent discussions on nonproliferation that the Chinese have not formally subscribed to? That is what we are doing. We are being asked to use a written summary of subsequent discussions that the Chinese have not formally described to as a basis for judging the adequacy of present Chinese nonproliferation policy. I say no, that is not adequate.

We need a comprehensive description prepared by the Chinese themselves so we can see whether what they say is consistent with what the State Department believes, and also so that we have a formal basis for comparing future Chinese actions to Chinese words in the area of nuclear nonproliferation.

Mr. Chairman, we are being asked, basically, by the administration to believe that in January 1984, China began turning over a new leaf in international behavior; that we have reason to put some trust in Chinese assurances of peaceful uses of our exports so that safeguards are not necessary; and that we should assume the Chinese interpret the agreement the way we do. That might be the way to treat a close ally with a very long standing record of benign intentions; but I do not quite believe that is the situation we are dealing with here.

Is this agreement alone, without filling in the gaps and removing the potential for misunderstanding, sufficient to encourage good Chinese nuclear behavior?

We have already had some parallel experience to draw on in this respect.

In January 1984, we signed a nonnuclear high technology export agreement with China.

One month later, five persons were arraigned in the Federal District Court in Newark, charged with plotting to smuggle high technology equipment to China.

The New York Times reported on February 14, 1984, that the assistant U.S. attorney called the plot, involving up to $1 billion in missile guidance and radar jamming gear, "a very serious defense matter."

According to the Chicago Tribune, of February 14, 1984, an Assistant Commissioner for Enforcement with the Customs Service in New York said, "It was very clear that they were buying on behalf of the Peking government and that they planned to divert the equipment through Hong Kong to Peking."

Was that a unique case? Hardly.

Three months later there was another case after the high-technology agreement went into effect. It was a 17 count indictment for the illegal export of electronic testing and calibrating equipment to China, filed in Los Angeles.

The Los Angeles Times said of that, "A primary use of some of the exports is in nuclear research." Later on, the article states: "Authorities believe that (the individual arrested) was supplying hardware for use at China's main nuclear testing site in the northwestern part of the country."

Evidently the signing of a high technology export agreement with China did not, at that time, provide a sufficient incentive for good behavior by the People's Republic of China in high technology trade.

Mr. Chairman, this is the record the committee must consider in deciding what to do about the United States-China agreement.

Mr. Chairman, I have attempted to approach this agreement in a spirit of constructiveness, and I believe I have identified the basic problems which can be naturally remedied in the context of the diplomatic discussions provided for by the agreement. These are incorporated in the bill that I am introducing today with the cosponsorship of Senator Roth, entitled "The Sino-American Nuclear Verification Act of 1985."

This bill will not prevent the agreement from formally going into effect. But what it would do is postpone any actual nuclear transfers or retransfers to the People's Republic of China until the President of the United States certifies that the deficiencies have been rectified. Under those conditions, I believe this agreement could go forward and should go forward and be enthusiastically supported.

I will submit a copy of the bill to the committee with an explanatory fold-out chart, Mr. Chairman, which I might run through very briefly since I have just a little time left.

The major issues of concern that I have mentioned here are, first, verification of peaceful uses. In the spread sheet that I believe you have before you, the agreement language says, "The parties will use diplomatic channels to establish mutually acceptable arrangements for exchanges of the information." In other words, there is no agreement now. No standard is provided for verification. We provide for that kind of verification, that it be agreed to, so there can be no misunderstanding.

In the second area, under U.S. consent rights, the agreement, as drawn up now, says, and I quote: "In the event that a party would like at some future time to undertake such activities"—such as reprocessing or enrichment—"the parties will promptly hold consultations to agree on a mutually acceptable arrangement." All we have is a commitment to hold consultations.

Mr. Chairman, I would submit that that is not adequate. We try to correct that so there will be agreement on exactly how we would do that in the future, and the President would certify that.

Another area is the relationship of the agreement to future U.S. export laws and regulations. In the agreement language, it says, "The parties recognize, with respect to observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Well, that would mean that this agreement, vague though it is, would supercede United States law if the Chinese chose to interpret it that way.

I would point out also that the reference here, "justification for its failure to perform a treaty," refers to treaty, and this is not a treaty. It is not a treaty in any form, or it would have to be submitted for approval by this Foreign Relations Committee and submitted for consent or approval by the whole Senate.

Mr. Chairman, what we do is take the language of the agreement and by the proposals we have made in this legislation try to do the minimal to straighten out the misunderstandings that may occur in the future. I would hope the committee would approve this legislation. I hope that we can get it out well before the deadline imposed by the provision of 90 days of continuous session for congressional review.

I would be glad to respond to your questions.

[Senator Glenn's prepared statement and supporting documents follow:]

PREPARED STATEMENT OF SENATOR GLENN

Mr. Chairman:

I wish to thank you and the rest of the Committee for granting my request to testify on the U.S./China nuclear accord - an agreement which is flawed, to be sure, but whose weaknesses can be overcome with the help of congressional action. Such action, if undertaken, would enable us to realize the potentially great benefits for both parties that a well-crafted agreement could bring.

But, if left as is, the agreement has the potential to become an ongoing irritant in U.S./China relations with a possible reduction in U.S. national security and weakening of the international nonproliferation regime.

STATUTORY REQUIREMENTS

Now Mr. Chairman, before going into the details of the agreement, I would like to say a word about the requirements for new agreements in Section 123a of the Nuclear Nonproliferation Act of 1978 (NNPA), an Act that I was proud to co-author. Section 123a was never meant to be an absolute ceiling on the requirements for nuclear cooperation with another country. These were viewed as statutory requirements which might be expanded at the prerogative of the Executive Branch on a case-by-case basis. Indeed, before we signed an agreement with the Egyptians, we insisted that they become signatories to the Nuclear Non-Proliferation Treaty (NPT), which is not required by the

NNPA, and we inserted provisions on reprocessing that went far beyond the requirements of the NNPA because we did not feel comfortable with the possibility of any separation of plutonium occurring in the Middle East.

In addition, we need to recognize that times have changed since the passage of the NNPA seven years ago. At that time there was not the sensitivity to vertical proliferation that exists today, and the discriminatory advantages on nuclear trade given to weapon states over nonweapon states was not as resented then as it is today. So the issue is not just whether the minimal statutory requirements have been met. To sign an agreement with a weapon state without a safeguards provision in such a worldwide political climate is to wave a red flag in the face of all NPT signatories. The fact that this particular red flag is also the flag of Revolution does not make it any better.

Now, I think we are all aware of the Administration's argument that China represents a special case - not only because it is a nuclear weapon state - but also because we are trying to provide additional incentives for the PRC to join the community of nations working against proliferation. But I would argue, Mr. Chairman, that in fashioning this particular agreement, we have gone to extraordinary and unnecessary lengths to accomodate the PRC, and in so doing, we risk seriously undermining and not enhancing our nonproliferation interests.

LACK OF SAFEGUARDS

I would like to now review those provisions of the Agreement that I find particularly troubling.

First, and perhaps foremost, the Agreement is completely opaque on the question of verifying peaceful uses of items exported to the PRC by the U.S.

Article 5 (3) of the Agreement states that:

> "Material, facilities or components transferred pursuant to this agreement and material used in or produced through the use of any material, facility or components so transferred shall not be used for any nuclear explosive device, for research specifically on or development of any nuclear explosive device, or for any military purpose."

But verification of this peaceful use requirement is uncertain. Article 8 (2) states that:

"The parties recognize that this cooperation in the peaceful uses of nuclear energy is between two nuclear-weapon states and that bilateral safeguards are not required." A little later on, the paragraph goes on to state that:

"(T)he parties will use diplomatic channels to establish mutually acceptable arrangements for exchanges of information and visits to material, facilities and components subject to this agreement".

So the only verification the U.S. will have of peaceful uses will be through these "visits". There is no standard provided to enlighten anyone as to what would constitute adequate verification, and you may be sure that the PRC will use the competitive posture of the French and others to pressure our negotiators into not demanding much.

What this means, in essence, is that the Congress is being asked to review favorably an agreement whose full content will be unknown to us until after the agreement goes into effect. I submit that that is a dangerous erosion of congressional prerogatives which were established in the first place because of dissatisfaction with Executive Branch performance in on nonproliferation activities.

If we do not establish appropriate standards of verification, not only do we risk the possibility of substantial crossovers of U.S. exported items from civilian to military activities, but we exacerbate seriously the already strained relationship on nuclear trade matters that exists between nuclear weapon states and nonweapon states. The discrimination built into the international nonproliferation regime, and particularly the NPT, has become a running sore that could ultimately threaten the Treaty. The Third NPT Review Conference that recently ended in Geneva is being viewed as a triumph because noone threatened to withdraw. But what message do we send to the 125 non-weapon-state signatories to the Treaty who are committed to put all their nuclear activities under safeguards, when we sign an agreement on nuclear trade that calls for no safeguards whatsoever on the grounds that the parties are weapon states?

After the NPT went into effect in 1970, it gradually became apparent to the weapon states that their positions were morally and politically indefensible. The gap in safeguards requirements was a factor inducing reluctance on the part of some important industrialized states to sign the NPT. As a result, the U.S. made a voluntary offer to allow IAEA safeguards on our peaceful nuclear facilities. Such safeguards, including the inspections that are a part of them, are in place now at selected U.S. facilities. Similarly, because of their membership in Euratom and the IAEA/Euratom Agreement, the peaceful nuclear activities of Great Britain and France are subject to safeguards. Even the Soviet Union, as closed a society as exists on earth, has made a voluntary offer to allow IAEA safeguards on selected facilities inside her territory.

So then, why does the U.S./China Agreement not call for safeguards? We are told, in the statutorily required Nuclear Proliferation Assessment Statement (NPAS) accompanying the Agreement, and prepared by ACDA, that:

> "(T)he United States did seek Chinese acceptance of IAEA safeguards on U.S. supply under the agreement, but the Chinese adamantly refused."

They refused, and we caved. The Japanese did not cave - their nuclear agreement with the Chinese calls for safeguards; the Argentines did not cave - their nuclear agreement with the PRC calls for safeguards: the Brazilians did not cave - their nuclear agreement with the PRC also calls for safeguards. But we caved. The Japanese, the Argentines, the Brazilians get safeguards. We get "visits" - because the Chinese were "adamant".

Well, how adamant are they, really? Here is what Ambassador Kennedy said at a hearing on July 31, 1985, before the House Foreign Affairs Committee, in explaining the provisions of the agreement:

> "This agreement does not provide for International Atomic Energy Agency safeguards in the PRC.... But neither does the agreement foreclose such safeguards, were China to undertake a voluntary offer with the IAEA as the other nuclear-weapon states have done." (Emphasis added).

Well, guess what? At the recent IAEA General Conference, the PRC announced that they, too, would join the other weapons states in making a voluntary offer to allow IAEA safeguards on some of their facilities. This was announced after the signing of the agreements with Japan, Argentina, and Brazil, and therefore suggests they may indeed be prepared to go further than their obligations under those agreements.

Mr. Chairman, of all the arguments that the Administration has advanced thus far to defend its failure to put safeguards arrangements into this agreement, the one that irks me the most is contained in the Legal Memorandum prepared by the Executive branch answering claims that the law requires a guaranty of safeguards. This Memorandum says, in part, that we were not under legal obligation to require safeguards, and to back this up, references agreements that we signed 30 years ago that did not contain safeguards. I think it is the height of tawdriness to suggest that what might have been acceptable nuclear policy in 1955 is acceptable in 1985. The fact is, there was no IAEA 30 years ago, and this is the first nuclear power agreement we have signed since the IAEA safeguards system became operational in the 1960's that does not contain a safeguards requirement. So the bottom line, Mr. Chairman, is that regardless of the merits of the arguments concerning legal requirements, as a matter of good policy and protection of our national security, I believe the U.S. should insist that the verification of peaceful uses for any exported items to the PRC be covered by IAEA safeguards or their equivalent. To do less under these circumstances is to take a 30 year backward leap and to let our nonproliferation policy be dictated by short-term considerations that may cause serious trouble for us later on.

U.S. CONSENT RIGHTS

This brings me to the second area of concern I have regarding this agreement - the exercise of statutorily required U.S. consent rights. The NNPA requires that any new agreement provide the U.S. with consent rights over various activities, including the further enrichment of U.S.-supplied fuel, the reprocessing of spent fuel of U.S.-origin, and the reprocessing of spent-fuel that has passed through a U.S. reactor. That provision was put into the NNPA because nuclear weapons require critical masses of either highly enriched uranium or plutonium in order to explode. Plutonium is formed as uranium fuel fissions, and can be separated out through chemical reprocessing of the spent fuel. Hence, by controlling the further enrichment of any low-enriched fuel we might export, and by controlling reprocessing of any spent fuel, we have effective control over the manufacture of weapons-usable materials, without which no nuclear weapons can be made.

The U.S./China agreement deals with this issue in Article 5(2) in language that is so arcane and convoluted it almost defies belief that both sides could agree on its precise interpretation. In essence, Article 5(2) says that whenever the PRC decides it wants to separate plutonium from spent fuel that has emerged from a U.S. reactor,

> "(T)he parties will promptly hold consultations to agree on a mutually acceptable arrangement. The Parties

> undertake the obligation to consider such activities favorably...." (Emphasis added).

Later in the same paragraph, it is explained that during these consultations, the parties:

> "(W)ill seek agreement within six months on long-term arrangements for such activities",

and that,

> "If such an arrangement is not agreed upon within that period of time, the parties will promptly consult for the purpose of agreeing on measures which they consider to be consistent with the provisions of the agreement in order to undertake such activities on an interim basis."

Still later, the paragraph states that:

> "The parties agree that the consultations referred to above will be carried out in a manner to avoid hampering, delay, or undue interference in their respective nuclear programs."

Now, Mr. Chairman, I submit that it would be difficult for any fair-minded person to look at this language and conclude that there was no bias here in favor of Chinese interests on reprocessing or enrichment or any other area involving the exercise of our consent rights. Some people think this language is so biased in that direction that, in essence, we have given up our consent rights. Personally, I do not go that far. But the language does have the potential for creating a serious dispute with the Chinese in the future unless we are certain that the Chinese interpret the language the same way we do. Let me explain this as follows.

In the Nuclear Proliferation Assessment Statement (NPAS) of ACDA, on p. II-9, the statement appears that:

"The Chinese cannot undertake reprocessing, enrichment, or alteration if the United States objects on grounds that such activity 'would prejudge the long-term arrangements or adversely affect cooperation'." (The quote within the quote is directly from Article 5(2)). What is not mentioned in the ACDA analysis is the possibility of the PRC invoking that part of Section 5(2) that I quoted earlier to the effect that there is an obligation on both parties to reach mutual agreement "in a manner to avoid hampering, delay or undue interference in their respective nuclear programs".

The Chinese can also point to a sentence in Article 5(2) that I did not quote earlier which says:

> "Nothing in this article shall be used by either party to inhibit the legitimate development and exploitation of nuclear energy systems for peaceful purposes in accordance with this agreement."

Thus, the question is whether the situation could arise where the U.S. says "no" to reprocessing, but the Chinese claim we are violating the agreement's requirement that the U.S. consider such activities favorably; that we not hamper, delay or unduly interfere with their nuclear program; and that we not inhibit their legitimate development of and exploitation of nuclear energy systems for peaceful purposes.

Mr. Chairman, the Executive Branch has examined such questions in their Legal Memorandum, and they have laid out a good legal argument claiming the Chinese would not be in their rights to make such claims. The trouble with their analysis is that they do not claim that the Chinese accept this argument. And without such an understanding, we face a possible future situation with the Chinese that is similar in some respects to the situation we have with India over the reprocessing of spent fuel at Tarapur. That dispute has not helped U.S./India relations, and there is no reason why we ought to repeat it with the Chinese.

The solution to this is very simple, Mr. Chairman. We simply need to have the Chinese recognize what the State Department says is obvious - that the language of the agreement neither favorably or unfavorably disposes the U.S. to exercise its consent rights in any particular direction. That is, the language is neutral and the U.S. will say "yes" or "no" to Chinese requests in accordance with our security and nonproliferation interests at the time.

AGREEMENTS AND INTERNAL U.S. LAW

A third area in the agreement that is troubling to me resides in the last sentence in Article 2(1). It states:

> "The parties recognize, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Mr. Chairman, perhaps this sentence appears in another Agreement for Cooperation somewhere in the past. If it does, I have not discovered it. It is a curious statement, because the United States has never treated Agreements for Cooperation as treaties. The Senate does not ratify them, and they generally do not put the U.S. under obligation to actually engage in any nuclear trade. They are, instead, frameworks within which contracts that do involve obligations can be entered into. An agreement does not substitute for U.S. export laws and regulations. Indeed, such laws and regulations can be changed at will without normally affecting such agreements, and that would appear to be the case in the present agreement as well when we look at the next-to-last sentence in Article 2(1). It states:

> "Each party shall implement this agreement in accordance with its respective applicable treaties, national laws, regulations and license requirements concerning the use of nuclear energy for peaceful purposes."

This would appear to say we can change our laws and regulations as we wish and Chinese export requests will be subject to them. But the last sentence of Article 2(1) seems to suggest that changing our domestic export laws might put us in violation of the agreement (although the word "treaty" is used).

Now, again, I understand that the Executive Branch does not believe the language can be read that way in a legal sense, but, again, we have no assurance that the Chinese also see it that way.

I do not believe it would be a good idea for nuclear trade with China to proceed without an understanding by the PRC that future export requests by them will be subject to whatever export criteria and regulations are in effect at that time.

PRC NONPROLIFERATION POLICY

The three deficiencies in the agreement I have discussed thus far - lack of safeguards, the possibility of misinterpretation of our consent rights, and the possible misunderstanding about the applicability of future export laws and regulations, would be of concern regardless of who the trading partner was, Mr. Chairman. But I think we have reason to have particular concerns in the case of the PRC because of the history of its relationship with the U.S. and the history of its policies and practices in the area of nuclear trade.

I need not remind the Foreign Relations Committee that there have been two major political upheavals since the PRC was established 36 years ago, so there is some question about the wisdom of signing 30 year nuclear agreements with a nation that is undergoing such instabilities.

I also need not remind this Committee that after the second Shanghai Communique was signed in August, 1982, we thought we had struck a deal in which a reduction in arms sales to Taiwan was predicated on the PRC's promise of a peaceful solution to the Taiwan issue. The day after the Communique was signed, Chinese leaders said they had made no such promise. This experience alone suggests the importance of ensuring that Chinese and U.S. understandings of the language of the agreement are commensurate with each other.

But it is China's nonproliferation policies themselves that may require the most careful scrutiny.

The history of China's nonproliferation policies and activities is not a happy one. For example, on August 16, 1963, in the Peking Review, an official statement contained the following passages:

> "Whether or not nuclear weapons help peace depends on who possesses them. It is detrimental to peace if they are in the hands of imperialist countries; it helps peace if they are in the hands of socialist

Please note that in this time frame we had concluded the Partial Test Ban Treaty with the Soviets, a treaty that was criticized severely by the Chinese and which they have not signed to this day.

Now, of course the statement I quoted from was made before China became a nuclear power herself in 1964. Did that event change her attitude about proliferation of weapons? No, it did not.

In 1966, Zhou En Lai stated that the draft Nuclear Nonproliferation Treaty (NPT) was "a great conspiracy against all peace-loving countries and people."

In 1977, the Chinese news agency "Xinhua" described a Comprehensive Test Ban (CTB) as "a new starting point for another round of the nuclear race. The hegemonic practice of prohibiting the small- and medium-sized countries from developing their own nuclear weapons can deceive nobody."

In 1981, a Chinese delegate declared to the United Nations Commission on Disarmament that a CTB "can only tie the hands of those countries with weaker defense capabilities...."

Well, Mr. Chairman, we have seen many newspaper reports in recent years that the Chinese pro-proliferation stance was backed up by more than words. China was reported as helping Pakistan with the latter's nuclear weapons program, and China was reported to have sent heavy water to Argentina and enriched uranium to South Africa without requiring safeguards.

Now we are told by the Executive Branch that Chinese policies have changed. Last year, a public declaration was made by Premier Zhao Ziyang that "...we by no means favor nuclear proliferation, nor do we engage in such proliferation by helping other countries to develop nuclear weapons." The problem with this statement (besides the fact that it was preceded by criticism of the NPT and a reiteration of China's refusal to accede to it) was that not long after it was made, Chinese scientists were reportedly discovered at the Kahuta site in Pakistan which is the site where a clandestine nuclear enrichment plant is reportedly being built - a plant that will have the capability of producing weapons grade high enriched uranium. It was that discovery that put this agreement on hold for over a year.

Despite this history, we are asked to accept, as a definitive description of Chinese nonproliferation policies, a summary of discussions on the subject prepared by U.S. negotiators, and not signed by the Chinese.

Mr. Chairman, over the past year we have observed Chinese entry into the IAEA, its voluntary offer to allow safeguards on some of its facilities, and its promise to require safeguards on all its nuclear power exports to nonweapon states. These acts do suggest that the Chinese see value in behaving more responsibly on nuclear matters. But the Pakistani incident took place during the period when it was believed by our negotiators that Chinese policy had changed significantly. Given this history, should we depend on a written summary of subsequent discussions that the Chinese have not formally subscribed to as a basis for judging the adequacy of present Chinese nonproliferation policy? I say no. We need a comprehensive description prepared by the Chinese themselves so we can see whether what they say is consistent with what the State Department believes, and also so we have a formal basis for comparing future Chinese actions to Chinese words in the area of nuclear nonproliferation.

Mr. Chairman, the history of Chinese nonproliferation policies suggest that certain questions should be put to Ambassador Kennedy or ACDA Director Adelman. For example, in the NPAS attached to the agreement, it is stated that:

"A few of the major provisions in the agreement were subject to long and difficult negotiations. We have had detailed discussions on what it means in practice to assist other countries to acquire nuclear explosives."

The Administration witnesses should be asked whether this means that we have told the Chinese that transfers of reprocessing or enrichment equipment or technology, even under safeguards, constitutes assisting other countries to acquire nuclear weapons capabilities according to our policies and laws (e.g., the Glenn/Symington Amendment to the Foreign Assistance act). And if we have informed the PRC about that, did we get a commitment from them that they will not engage in such activity? This is an important point. The spread of reprocessing or enrichment technology is tantamount to the spread of weapons technology, and there is reason to wonder about the Chinese attitude on such questions. At the international colloquium on nonproliferation sponsored by the Groupe de Bellerive in Geneva in June, the Chinese representative, Mr. H.E. Jiadong Qian, in a rather extended attack on the NPT, stated that the rights of nonweapon states party to the Treaty to participate in the fullest possible exchange of equipment, materials, and information for the peaceful uses of nuclear energy were effectively being denied. To quote Mr. Qian:

> "(I)n order to exercise such rights the non-nuclear-weapons States, apart from accepting IAEA safeguards, are moreover required to enter into special arrangements with the supplier countries. These extra conditions have in actuality hampered the non-nuclear-weapon States from enjoying what is their due." (Emphasis added).

This statement may be interpreted to mean that supplier agreements to show restraint on the transfer of sensitive nuclear technologies like reprocessing and enrichment are denials of the rights of non-weapon states. Does this mean China will not abide by such restraints? And does it mean that if we say "no" to China on reprocessing, that China will interpret this as a denial of her own rights under the agreement?

There are other questions. Did we query the Chinese regarding a story in the London Financial Times of August 14, 1984 that the Chinese had given the Pakistanis some highly enriched uranium? If we did, what was the answer to our query?

Finally, would Ambassador Kennedy and Mr. Adelman favor the transfer of high technology items to the Soviet Union with verification of peaceful uses assured only by "visits"?

Mr. Chairman, we are being asked, basically, by the Administration to believe that in January 1984, China began turning over a new leaf in international behavior; that we have reason to put some trust in Chinese assurances of peaceful uses of our exports so that safeguards are not necessary, and that we should assume the Chinese interpret the agreement the way we do. That might be the way to treat a close ally with a long standing record of benign intentions, but is that the situation we are dealing with here?

Is this agreement alone, without filling in the gaps and removing the potential for misunderstanding, sufficient to encourage good Chinese nuclear behavior?

We have already had some parallel experience to draw on in this respect. In January, 1984, we signed a nonnuclear high-tech export agreement with China.

One month later, five persons were arraigned in the Federal District Court in Newark, charged with plotting to smuggle high-technology equipment to China. The _New York Times_ reported on February 14, 1984 that the Assistant U.S. Attorney called the plot, involving up to $1 billion in missile - guidance and radar-jamming gear, "a very serious defense matter". According to the _Chicago Tribune_ of

February 14, 1984, an Assistant Commissioner for Enforcement with the Customs Service in New York said: "It was very clear that they were buying on behalf of the Peking Government and that they planned to divert the equipment through Hong Kong to Peking".

Was that a unique case? No. Three months after the high-tech agreement went into effect, a 17-count indictment for the illegal export of electronic testing and calibrating equipment to China was filed in Los Angeles.

An Assistant U.S. Attorney was quoted in the Los Angeles Times of April 11, 1984 as saying, "A primary use of some of the exports is in nuclear research." Later on, the article states: "Authorities believe that (the individual arrested) was supplying hardware for use at China's main nuclear testing site in the northwestern part of the country."

Evidently, the signing of a high-tech export agreement with China did not provide a sufficient incentive for good behavior by the PRC in high-tech trade.

So, Mr. Chairman, this is the record the Committee must consider in deciding what to do about the U.S./China agreement.

Mr. Chairman, I have not attempted to be encyclopedic in my discussion of this agreement. For example, I have not discussed the question of what happens if the PRC replicates any equipment or technology transferred under the agreement. Under the Agreed Minute of the agreement, the PRC appears to have every right to use such replicated equipment or technology for weapons or other military purposes. I make no recommendation as to how or even whether to deal with this issue, but the Congress should be aware that this is what the agreement appears to allow.

Mr. Chairman, I have attempted to approach this agreement in a spirit of constructiveness, and I believe I have identified those problems which can be naturally remedied in the context of the diplomatic discussions provided for by the agreement. These are incorporated in a bill I am introducing today, with the cosponsorship of Senator Roth, entitled, The Sino/American Nuclear Verification Act of 1985.

My bill will not prevent the agreement from formally going into effect, but it would postpone any nuclear transfers or retransfers to the PRC until the President certifies that the deficiencies have been rectified. Under those conditions, I believe this agreement could go forward and be enthusiastically supported. I would like to submit a copy of the bill as well as an explanatory three-page chart for the hearing record.

The bill will undoubtedly be referred to the Foreign Relations Committee, Mr. Chairman. I hope you will see fit to have the Committee consider the bill in a time frame that would allow action to be taken on it before the 90 day review period of the agreement expires.

That concludes my testimony. Thank you very much.

PROBLEMS WITH THE U.S./CHINA NUCLEAR AGREEMENT AND PROPOSED SOLUTIONS IN THE SINO/AMERICAN NUCLEAR VERIFICATION ACT OF 1985

1 of 3

ISSUE	AGREEMENT LANGUAGE	PROBLEM	BILL LANGUAGE	COMMENT
Verification of Peaceful Uses	"The parties will use diplomatic channels to establish mutually acceptable arrangements for exchanges of information and visits subject to this agreement."	No standard is provided for verification of peaceful uses for exported equipment, materials, or technology, and the diplomatic discussions will not be completed until congressional review is finished and the agreement is in effect.	(For nuclear trade with China to proceed, the President must certify that.) "The verification of peaceful uses on exported items covered by the Agreement for Cooperation will be essentially equivalent to that provided by the materials accounting and inspection standards normally applied by the IAEA in accordance with its document INFCIRC/66/REV. 2 entitled "The Agency's Safeguards System (1965, as provisionally extended in 1966 and 1968)."	China has joined the IAEA and has made a voluntary offer to allow safeguards on some (unspecified) facilities. This provision of the bill would require China, in essence, to allow safeguards on U.S. exported items. The U.S. itself allows IAEA inspection of U.S. peaceful nuclear facilities under an agreement with the Agency signed in 1979.
U.S. Consent Rights	"In the event that a party would like at some future time to undertake such activities, the parties will promptly hold consultations to agree on a mutually acceptable arrangement. The parties undertake the obligation to consider such activities favorably, and agree to provide pertinent information on the plans during the consultations."	The "activities" include the production of weapons-usable materials from U.S.-supplied fuel or U.S.-origin spent fuel. Unbiased exercise of required U.S. consent rights over such activities appears to be compromised by unorthodox language that may be interpreted to suggest that the U.S. is biased toward acceding to Chinse requests.	(For nuclear trade with China to proceed, the President must certify that.) "The Government of the People's Republic of China has communicated its recognition that the Agreement for Cooperation neither favorably nor unfavorably disposes the United States toward approving or agreeing to any enrichment, reprocessing, or alteration in form or content of material transferred pursuant to the Agreement for Cooperation or material used in or produced through the use of any material or facility transferred pursuant to the Agreement for Cooperation.	The State Department claims that there is no intent, nor should anyone interpret the Agreement, to bias the exercise of U.S. consent rights. The bill would ensure that China agrees with this view. This would avoid repetition of a similar problem that arose with the U.S./India Agreement for Cooperation because of lack of clarity, with each side in the dispute making conflicting claims.

ISSUE	AGREEMENT LANGUAGE	PROBLEM	BILL LANGUAGE	COMMENT
China's Nonproliferation Policies	N/A but U.S. policy requires that countries with whom we enter into nuclear agreements must establish and maintain satisfactory nonproliferation policies.	Past PRC policy statement and actions have favored proliferation. The only detailed description of the PRC's present nuclear nonproliferation policies is contained in a classified summary of discussions prepared by the State Department, and not formally endorsed by the PRC.	(For nuclear trade with China to proceed, the President must certify that:) "The Government of the People's Republic of China has provided a public, written, detailed description of its nonproliferation policies, and those policies correspond in all essential elements and details to the description of such policies contained in the Department of State document entitled "United States Summary of Discussions" (relating to China's nonproliferation policy)."	A general statement made by Premier Zhao in February 1984, that "we by no means favor nuclear proliferation on, nor do we engage in such proliferation by helping other countries to develop nuclear weapons" was followed by the initialling of the Agreement in April 1984 during President Reagan's visit. This was followed, in turn, by the reported discovery of Chinese technical personnel at the clandestine Pakistani nuclear enrichment plant at Kahuta. The Agreement was, consequently, not signed until July, 1985, at which time the State Department produced its classified "summary of discussions". Since this summary has not been officially recognized by the PRC, it is important to have the PRC's account of its policies to ensure there is full understanding of the nonproliferation policies of the PRC, including its commitment not to assist Pakistan and other nations in developing nuclear weapons capabilities.

ISSUE	AGREEMENT LANGUAGE	PROBLEM	BILL LANGUAGE	COMMENT
Relationship of Agreement to future U.S. Export laws and Regulations	"The parties recognize, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."	Unorthodox language in Agreement may be interpreted to suggest that the application to nuclear trade with China of U.S. export laws and regulations enacted after the Agreement goes into force, could be a violation of the Agreement.	(For nuclear trade with China to proceed, the President must certify that:) The Government of the People's Republic of China has communicated its recognition that all proposed exports of nuclear materials, equipment, or technology under the Agreement for Cooperation are subject to such laws and regulations of the United States which are in effect at the time of each such export or the licensing thereof.	An Agreement for Cooperation is not a treaty. Treaties require ratification by 2/3 majority vote of the U.S. Senate. Rather, Agreements for Cooperation are meant to be frameworks for engaging in nuclear trade; they do not obligate the U.S. to make any transfers, nor are they a substitute for binding contracts. It is normally expected that an applicant for an export at any given time will be required to satisfy whatever laws and regulations are in effect at that time regarding licensing or other procedures for export approval, and that this is legal and proper under an Agreement for Cooperation. The Bill language ensures that the Chinese will not view future additional export laws or regulations as lying outside the framework of the Agreement.

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GOVERNMENTAL AFFAIRS
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PROLIFERATION, AND GOVERNMENT PROCESSES
WASHINGTON, DC 20510

SUBCOMMITTEE:
THAD COCHRAN, MISSISSIPPI, CHAIRMAN
WILLIAM S. COHEN, MAINE   JOHN GLENN, OHIO
JAMES H. LOFTON, STAFF DIRECTOR

October 8, 1985

Dear Colleague:

On July 24, 1985, the President submitted the Agreement for Cooperation between the United States and the People's Republic of China (PRC) to Congress for review. Under the Nuclear Nonproliferation Act of 1978 (NNPA), as amended, the Congress has 90 days of continuous session to consider the agreement, but if no joint resolution of disapproval is enacted during that period, the agreement goes into effect.

BUSINESS POTENTIAL GOOD--BUT NO SAFEGUARDS

This agreement, the first such with a nuclear weapons state since passage of the NNPA, has been spurred by the prospect of potential gains in our balance of payments if the U.S. is successful in the competition for China's nuclear business. It is unique in its language which, among other things, does not provide for safeguards to verify peaceful uses of exported items, and appears to compromise the exercise of statutorily required U.S. consent rights over production of weapons-usable materials by the Chinese from U.S.-origin spent fuel.

DEFICIENCIES AND AMBIGUITIES MAY MEAN FUTURE SERIOUS DISAGREEMENTS

We are concerned that the above deficiencies, coupled with certain other ambiguities of language, unless rectified, may foster differing interpretations of the agreement with potentially serious consequences not only for future Sino/American relations, but also for future U.S. effectiveness in the international arena on nonproliferation matters.

PRC POLICY: FOR OR AGAINST PROLIFERATION?

The problems with the language of the agreement itself magnify our concern that the agreement is accompanied by no definitive statement of the PRC's nuclear nonproliferation policies. All we have is a summary of discussions on this subject prepared by the U.S. State Department and not formally endorsed by the PRC. We should recall that until 1984, PRC public statements endorsed proliferation. In addition, even after Premier Zhao stated in 1984 that the PRC would not assist other nations to develop nuclear weapons and the U.S./China Agreement was initialed, reports surfaced about the presence of Chinese nuclear scientists at the site of a clandestine Pakistani nuclear plant capable of producing weapons materials. As a result, the signing of the Agreement was delayed by more than a year until Vice Premier Li Peng visited the White House in July, 1985. We believe that a formal commitment by the PRC to the policies described in the State Department's summary of discussions is a needed and appropriate adjunct to the agreement if nuclear trade with China is to proceed.

DEFICIENCIES CAN BE REMEDIED WITHOUT REOPENING AGREEMENT

Since the agreement itself provides for diplomatic discussions after the agreement goes into effect to determine procedures for U.S. "visits" to exported items, the deficiencies we have identified can be remedied within the context of those discussions and need not require reopening the agreement for further negotiation. Accordingly, we do not support a resolution of disapproval of the agreement, but we do believe legislation is called for.

THE SINO/AMERICAN NUCLEAR VERIFICATION ACT

It is our intention to introduce the Sino/American Nuclear Verification Act of 1985 (SANVA) to deal with this problem. Our bill will not prevent the agreement from formally going into effect but the bill, if enacted, postpones any nuclear transfers or retransfers to the PRC until the President has certified that the identified deficiencies have been rectified. A draft of the bill and an explanatory three-page chart are attached to this letter.

If you would like to be a co-sponsor of this legislation, or if you have any questions please call Len Weiss at 4-4508, or Ian Butterfield at 4-2441.

Sincerely,

Bill Roth
William V. Roth, Jr.

John Glenn
John Glenn

99th CONGRESS
1st Session

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. Glenn (for himself and Mr. Roth) introduced the following bill; which was read twice and referred to the Committee on ____________________

A BILL

To ensure adequate verification of peaceful uses of nuclear exports from the United States to the People's Republic of China, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the ''Sino-American Nuclear Verification Act of 1985''.

FINDINGS

Sec. 2. The Congress finds that--

(1) the international nuclear nonproliferation regime, including the safeguards system of the International Atomic Energy Agency (IAEA), and the domestic laws of the United States controlling nuclear exports, are important elements in the struggle against

the spread of nuclear weapons;

(2) nuclear trade involving nonsensitive safeguarded equipment, materials, and technology can be a useful component in an effective nuclear nonproliferation policy, is of economic value to the United States, and helps to fulfill the obligations of the United States under the Treaty on the Non-Proliferation of Nuclear Weapons, done on July 1, 1968;

(3) nuclear agreements for cooperation between the United States and other nations should be without ambiguity as to meaning or implementation and should be in keeping with the letter and spirit of the Nuclear Non-Proliferation Act of 1978 and the Atomic Energy Act of 1954;

(4) agreements for cooperation, including the agreement between the United States and the People's Republic of China, signed on July 23, 1985, do not constrain the United States from applying all laws and regulations regarding nuclear exports which are in effect at the time of the export or the licensing thereof;

(5) the national security of the United States may be put at risk by nuclear trade with nations whose nuclear nonproliferation policies are either unsatisfactory or are not sufficiently specific or detailed to judge whether they are satisfactory;

(6) the transfer or retransfer of nuclear equipment, materials, or technology to any nation without adequate verification of their peaceful uses undermines the international nuclear nonproliferation regime and is inimical to the common defense and security of the United States; and

(7) the Agreement for Cooperation Between the United States and the People's Republic of China Concerning Peaceful Uses of Nuclear Energy, signed on July 23, 1985 (hereafter in this Act referred to as the ''Agreement for Cooperation''), together with the Department of State document entitled ''United States Summary of Discussions'' (relating to China's nuclear nonproliferation policy), do not provide a sound basis for nuclear trade between the two countries without further clarification of--

(A) the verification of peaceful uses covering exported items;

(B) the rights of consent and the exercise thereof by the United States over the enrichment of United States supplied fuel, the reprocessing of United States-origin spent fuel, or the reprocessing of other spent fuel arising from a United States supplied reactor;

(C) Chinese nuclear nonproliferation policies;

and

(D) the relationship of the Agreement for Cooperation to future United States export control laws.

PURPOSES

Sec. 3. The purposes of this Act are to--

(1) provide for the clarification of understandings regarding the implementation of the Agreement for Cooperation;

(2) strengthen the nuclear nonproliferation regime by providing an example of United States leadership in fostering more equal treatment of nuclear-weapon states and nonnuclear-weapon states regarding conditions of nuclear trade;

(3) encourage commitments by nuclear-weapon states to formal or tacit adherence to the principle of safeguards for nuclear materials, equipment, and technology used for peaceful purposes; and

(4) protect United States national security interests through strict verification of peaceful uses and full retention of United States rights of consent concerning transfers or retransfers of United States nuclear equipment, materials, and technology as well as materials derived from United States facilities.

Sec. 4. (a) Notwithstanding any other provision of law, including any international agreement, no license may be issued for the export to the People's Republic of China of any nuclear equipment, materials, or technology, and no approvals for the transfer or retransfer to the People's Republic of China of any nuclear equipment, materials, or technology may be given by the United States until the expiration of a period of 30 days of continuous session of Congress after the President has certified to the chairman of the Foreign Relations Committee of the Senate and to the chairman of the Foreign Affairs Committee of the House of Representatives that--

(1) the verification of peaceful uses on exported items covered by the Agreement for Cooperation will be essentially equivalent to that provided by the materials accounting and inspection standards normally applied by the International Atomic Energy Agency in accordance with its document INFCIRC-66-Rev. 2 entitled ''The Agency's Safeguard System (1965, as provisionally extended in 1966 and 1968)'';

(2) the Government of the People's Republic of China has communicated its recognition that the Agreement for Cooperation neither favorably nor unfavorably disposes the United States toward approving or agreeing to any enrichment, reprocessing, or alteration in form or content of material transferred pursuant to the Agreement

for Cooperation or material used in or produced through the use of any material or facility transferred pursuant to the Agreement for Cooperation;

(3) the Government of the People's Republic of China has provided a public, written, detailed statement of its nuclear nonproliferation policies, and those policies correspond in all essential elements and details to the description of such policies contained in the Department of State document entitled ''United States Summary of Discussions'' (relating to China's nuclear nonproliferation policy); and

(4) the Government of the People's Republic of China has communicated its recognition that all proposed exports of nuclear materials, equipment, or technology under the Agreement for Cooperation are subject to such laws and regulations of the United States which are in effect at the time of each such export or the licensing thereof.

(b) For purposes of subsection (a), the continuity of a session of Congress is broken only by adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the period indicated.

The Chairman. Thank you very much, Senator Glenn.

As an experienced member of this committee as well as one involved in nuclear nonproliferation matters for some time, what do you estimate will be the impact of your legislation, if passed, upon our relationship with the People's Republic of China.

I ask this because I anticipate asking it of other witnesses. At least informally the answer of administration witnesses has been that the impact will be adverse and that there will be some strains, maybe even alienation. From your own experiences in the Far East, what is your own judgment?

Senator Glenn. Mr. Chairman, I would hope that the Chinese would approach this bill in the spirit in which it is offered. I am just trying to prevent future rough spots in this relationship. Nothing in here negates any conditions of the agreement. Nothing cancels out anything in the agreement or makes that a requirement.

In other words, we do not require this whole agreement to come up again for negotiation. We did not want to do that.

What it does try to do is identify those areas which are very vague or are subject to misinterpretation. I would hope also that the Chinese would see that adequate verification of peaceful uses is in their interest as well as in ours. It would be a useful political exercise for the Chinese to issue a public, written, detailed statement of their nonproliferation policies. We do not have that now. That is what we would like to have.

I think it would be a significant example on their part of very great statesmanship and leadership and would show the depth of their commitment to nonproliferation which they now express. So I think this can strengthen the agreement and not weaken it, if we have this go through. I hope the Chinese will approach this thing in that spirit, because that is the spirit in which it is given.

I have spent a lot of time in China. I lived in China for 6 months once, at the end of World War II. I know things have changed dramatically since the time I was there, but I have been back to China quite a number of times since then, on business for the Foreign Relations Committee when I was here, and on other matters of trade.

So I have considered myself a long-time friend of China. I want to see the Chinese move in terms of their policies. I am very happy to see their moves toward a less rigorous Communist ideology than they have had in the past. I want to see this agreement go through. But I want to see it go through on a basis that protects our leadership position in the world in trying to prevent the spread of nuclear weapons, and that does not create ambiguities that are going to be vexing to us in the future.

I think it is in China's interest as well as ours to straighten these things out now and have them clearly understood now, at the start, and not be matters of irritation down the road.

The Chairman. Thank you.

Senator Evans, do you have any questions for Senator Glenn?

Senator Evans. Mr. Chairman, I have not had an opportunity to fully look through the legislation that the Senator has suggested.

Senator Glenn, you said in your statement that this legislation would not prevent the agreement from going through and would not change it in any way. But from a brief reading it seems that, the essence of your legislation calls for no licensing. In other words, the provisions of the agreement could not be carried out in any respect, until 30 days after the Presidential certification to the chairmen of the Foreign Relations Committee of the Senate and the Foreign Affairs Committee of the House that the several elements have been carried forward. It seems to me that those elements are precisely the kinds of things you have complained about as not being in the current agreement.

I guess I fail to see why at least this effectively does not require the same thing as renegotiating the agreement, because you could not carry it forward without these things having been done.

Is this a misreading of the proposed legislation?

Senator GLENN. What it basically says is if the things the administration says are true, then let's have the Chinese agree to these. That is basically it.

Senator EVANS. Those are the things that are not in the agreement now and that I understand you are objecting to as not being in the agreement. While you do not change the agreement, in effect you are asking that the Chinese certify the very things that are not in the agreement.

Senator GLENN. What we are saying is that the understandings that have been written up by our parties to the negotiation are one-sided agreements unless the Chinese come in and say OK, we agree with those statements by the United States. The Chinese have not done that.

For instance, under verification, what we would say in this is that for nuclear trade with China to proceed, the President must certify that, quote: "The verification of peaceful uses on exported items covered by the agreement for cooperation will be essentially equivalent to that provided by the materials accounting and inspection standards normally applied by IAEA." That is very minimal.

I do not think the Chinese ought to have a disagreement with that. But it is one of those items of ambiguity that I think we should get straightened out.

To me, that would not require any renegotiation because the Chinese have joined the IAEA and have made a voluntary offer to allow safeguards on some, unspecified, facilities. This provision of the bill would require China, in essence, to allow safeguards on U.S. exported items. The United States itself allows IAEA in to inspect U.S. peaceful nuclear facilities under an agreement with the agency signed in 1979.

Senator EVANS. Do I understand, Senator, that the U.S. agreement is for selected sites and not all sites?

Senator GLENN. Yes, and one of the difficulties with agreement language is that the language says, "the parties will use diplomatic channels to establish mutually acceptable arrangements for exchanges of information and visits subject to this agreement."

That is a direct quote out of the agreement.

Senator EVANS. But the United States does not allow inspection of all sites. We just select certain sites. Isn't the same true of the Soviets as well?

Senator GLENN. I think that is correct. But we do not even have that agreement, on what sites it would be, in the agreement language that is before us now.

I think that is correct. Yes, it is.

Now, another one on U.S. consent rights, once again, all the agreement says is that we will hold consultations to agree on a mutually acceptable arrangement. It is not spelled out. That is very important because consent rights concern what they can do with our fuel or with working with other nations, or whatever. The activities referred to in that part of the agreement could include the production of weapons usable materials from U.S. supplied fuel or United States origin spent fuel, and unbiased exercise of required U.S. consent rights over such activities appears to be compromised, to say the least, by unorthodox language that could be interpreted to suggest that the United States is biased toward acceding to whatever the Chinese want to request.

Now we correct that.

Senator EVANS. Do you suggest that that is what the administration has in mind?

Senator GLENN. Oh, I don't think they have that in mind. No. I do not question the intent of the administration. I just think there are a lot of details in the way the agreement was worked out, a lot of details that are going to be problem areas in the future. That is my main concern in trying to provide a presidential certification of verification of United States consent rights, of the relationship of the agreement to future United States export laws, and a statement of Chinese nonproliferation policy.

Those are the four basic things that we want. Those are so minimal that I cannot imagine that the Chinese really would object to these things. None of them requires a renegotiation of the agreement.

What they do is require Chinese acknowledgment that the intent of the agreement, as expressed just by the American side, is also the intent of the Chinese, and that that is what they are willing to live by.

That is all we are trying to do with this legislation. It is very simple.

Senator EVANS. I do not necessarily disagree with that. I guess I am just trying to get at the essence of it. You say that it does not require a change in the agreement, but it does require a certification before the agreement can take effect.

Senator GLENN. Yes.

Senator EVANS. It seems to me that that is a distinction without a difference.

Senator GLENN. Well, perhaps so. But these are all Presidential certifications, from our President here. If our President cannot certify to the Congress, to this committee, that we do have, by his estimation, adequate verification, that these negotiations have resulted in adequate verification, if he cannot come to the Congress and say yes, he can certify that we have worked out satisfactory procedures with regard to United States consent rights, if he can't come come to us and say that our laws in the future will be adhered to, and if we can't have a statement of Chinese nonproliferation policies, then I would submit that we are on pretty thin ice.

I would hope the President, in stating that this agreement is satisfactory, will also be able to get the Chinese to say that yes, this is their understanding in these four areas also, and that being the case, if he can do that, I am very much in favor of this agreement.

Senator EVANS. Mr. Chairman, I just have one further question.

Senator, with respect to the proviso that the Government of the People's Republic of China provide a public, written, detailed statement of its nuclear nonproliferation policies, do you know whether those words or those terms have been provided by all of the other nuclear weapon states? Does France, does Britain, do the other nuclear weapon states provide that kind of detailed, written statement of their nonproliferation policies?

Senator GLENN. I don't know that we have required a specific statement like that. But for nations that are under IAEA and that have expressed their intent and that have been NPT signatories—of course, the French are not—as an NPT signatory, they have taken care of what that requirement would provide, for China.

Senator EVANS. You say that the French are not signatories?

Senator GLENN. France is not an NPT member. But they have said that they will abide by all of it, even though they are not a signatory to the NPT.

Senator EVANS. To your knowledge, they have not provided this kind of detailed, written, public statement of their nonproliferation policies?

[The information referred to follows:]

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October 16, 1985

The Honorable Daniel J. Evans
United States Senate
Washington, D.C. 20510

Dear Dan:

At the Foreign Relations Committee hearing on the U.S./China nuclear accord, you asked me if the U.S. has public, written, and detailed statements of the nonproliferation policies of Great Britain and France. The question was motivated by the requirement in my bill, the Sino-American Nuclear Verification Act, that the President certify that the PRC provide such a statement before nuclear trade with them proceeds. I did not give a complete answer to your question at the hearing, but will do so now via this letter.

The answer to your question is that all the nuclear weapons states except China have provided such statements by virtue of being:

1. Signatories to the NPT (in the cases of the U.S., U.K., and the U.S.S.R.) or (in the case of France) making a public announcement that they will act as if they are signatories.

2. Signatories to the London Suppliers Agreement (U.S., U.K., France, U.S.S.R.).

Both the NPT and the London Suppliers Agreement spell out in detail the responsibilities of the signatories or adherents on safeguards and nuclear trade, and constitute a public, written, and detailed statement of the nonproliferation policies of those signatories or adherents.

Of course, it follows that I would be pleased to say that the PRC has met the requirements for the President's certification in my bill were the PRC to follow in the footsteps of the other nuclear weapons states with respect to the NPT and the London Suppliers Agreement.

I would appreciate it if you could place this letter in the hearing record at the appropriate point.

With best regards.

Sincerely,

John

John Glenn
United States Senator

JG/lwv

Senator GLENN. I believe that is true.

The CHAIRMAN. Thank you very much, Senator Evans.

Thank you, Senator Glenn, for testifying this morning.

Senator GLENN. Thank you very much, Mr. Chairman.

The CHAIRMAN. The Chair now calls Senator William Proxmire as our next witness.

STATEMENT OF HON. WILLIAM PROXMIRE, A U.S. SENATOR FROM WISCONSIN

Senator PROXMIRE. Thank you very much, Mr. Chairman.

I see that the time is short, and so I am going to abbreviate my statement and deliver part of it. I ask unanimous consent that the remainder be printed in the record, along with two Library of Congress studies and a Nuclear Regulatory Commission letter, if that would be possible.

The CHAIRMAN. It will be printed.

The Chair will mention at the outset that in a few moments, I will go to be a part of the greeting party for the Prime Minister. Senator Evans will continue to chair the hearing until 10:30 a.m.

We appreciate very much your coming.

Senator PROXMIRE. Very good, and thank you very much, Mr. Chairman.

Mr. Chairman, I am going to skip the first five and a half pages of my statement and go to the major flaws in the United States-People's Republic of China agreement as it now stands.

There are four major flaws.

First, nowhere in the agreement does the People's Republic of China make a clear and unambiguous pledge to nonproliferation. They do not make it. In other agreements we have had such a pledge, but not with the People's Republic of China. In other words, we have gotten that pledge from the other nations.

This is a troubling omission, Mr. Chairman, considering that the country's past nonproliferation record is so suspicious.

In the People's Republic of China's case, the nonproliferation pledge should be plainly written in the agreement. It should not be a collection of dinner toasts, speeches, or secret unilateral understandings.

Think of it for a moment, Mr. Chairman, the People's Republic of China is the world's second leading Communist power, which was once our bitter enemy and which refuses to sign the 1979 Nonproliferation Treaty. Here we have an agreement where there is barely a hint at any commitment to nonproliferation.

Why should other countries that now sign agreements with us make any nonproliferation pledge when they see what the People's Republic of China has gotten away with?

No. 2, the People's Republic of China agreement has verification problems. The Nonproliferation Act requires that any cooperation agreement we sign with a nuclear weapons state, like the People's Republic of China, must have safeguards. These safeguards usually involve a thorough accounting and monitoring system for our nuclear exports.

Does the People's Republic of China agreement provide for safeguards? No, it does not, Mr. Chairman. It does not.

The agreement only calls for negotiations for some vague visitation rights down the road. If the President negotiated such a vague verification provision in an arms control agreement with the Soviets, Mr. Chairman, that provision would be laughed right out of the Senate.

Incidentally, it appears that our nuclear trade with our NATO partners, such as Great Britain and France, is governed by much tighter verification under the EURATOM safeguards than what we will impose on the People's Republic of China.

I would also point out, Mr. Chairman, that Argentina, Brazil, and Japan got the People's Republic of China to agree to accept International Atomic Energy Agency safeguards in their nuclear cooperation agreement. The obvious question is why didn't we get the same concession from the People's Republic of China in our nuclear cooperation agreement that the other nations got.

No. 3, the People's Republic of China agreement contains a provision that seems to say that the People's Republic of China can ignore any future U.S. nonproliferation laws that might restrict our nuclear exports.

In past nuclear agreements, there have been provisions that the agreement must comply with U.S. laws. But the People's Republic of China agreement appears to state that, if down the road, the United States passes another version of the 1978 Nonproliferation Act, say in response to some new nonproliferation threat, like the India nuclear explosion was in 1974, People's Republic of China officials could say the new law does not apply to their country under this agreement.

I am not the only one who has raised this concern, Mr. Chairman. The Nuclear Regulatory Commission, in an unclassified response to questions I raised about the agreement, states that it is also concerned that "this new provision could be read as reducing the flexibility of the United States, including that of Congress, in enacting and implementing future legislation affecting United States-People's Republic of China nuclear relations."

The larger problem, however, will be the effect this escape clause in the United States-People's Republic of China agreement has on our dealings with other countries. Will they demand this same escape clause in the nuclear cooperation agreements they negotiate or renegotiate with us?

Are we going to eventually end up with a situation where, if Congress passes another nonproliferation act to tighten export controls, all our nuclear trading partners will feel free to ignore the act?

I would ask, Mr. Chairman, that the letter I received from the Nuclear Regulatory Commission be included in the record. That letter, as the committee will see, reveals that the Nuclear Regulatory Commission has serious concerns whether certain provisions in the agreement will lead to what the Commission calls, and I quote, "future misunderstandings" between the United States and the People's Republic of China.

Senator **Evans** [presiding]. It will be included in the record.

Senator **Proxmire**. Thank you, sir.

The fourth and final flaw in the agreement is its most serious flaw. The Nonproliferation Act requires that a cooperation agreement have a clear and unambiguous guarantee that the United States has veto rights over another country reprocessing our spent fuel to extract its bomb-usable plutonium.

Does the People's Republic of China agreement have this clear-cut guarantee? No. No; it does not, Mr. Chairman.

In effect, the State Department has punted on this question. All the agreement says is that both sides will negotiate the veto rights down the road, after the People's Republic of China has warehouses full of our spent fuel piled up and ready to reprocess.

When that time comes, the agreement is worded in such a way that it would be very difficult for us to veto any plans by the People's Republic of China to extract the bomb-usable plutonium from our spent fuel.

As I have said, there are benefits from expanded trade with the People's Republic of China. But there are serious risks involved with nuclear trade, and this agreement does not appear to lessen those risks.

I might just conclude, Mr. Chairman, by saying that in the view of this Senator, the most serious threat to world peace, by far, is proliferation.

The prospect of a super power bolt from the blue, I think, is very slight, fortunately. But the prospect of a nuclear war beginning, if we proliferate nuclear weapons, if they spread around the world to other nations, I think is likely to be very great. Of course, that would be the greatest tragedy that could befall this country or mankind.

So, I think this is an extraordinarily important agreement. As I said, I think we are not only providing a far too loose agreement with the People's Republic of China, but we are initiating a precedent that I think is going to haunt us in the future in preventing the spread of nuclear weapons.

[Senator Proxmire's prepared statement and supporting documents follow:]

PREPARED STATEMENT OF SENATOR PROXMIRE

Mr. Chairman, I deeply appreciate having the opportunity to address the Committee on what I feel will probably be the most important nuclear cooperation agreement the United States will sign in this decade.

I would like to commend the Chairman and the other members of the Committee for holding these two very important hearings. I think you will agree with me that this agreement not only has tremendous implications for future economic relations between the United States and the People's Republic of China.

The agreement also has tremendous implications for U.S. nonproliferation policy and U.S. national security.

In the judgment of this Senator, nothing but nothing is nearly as important as stopping nuclear proliferation. The prospect of a planned premeditated nuclear attack by either superpower is fortunately very slight. But if nuclear weapons spread throughout the world, a nuclear war becomes a probability.

Earlier this year, Congress passed and the President signed into law provisions that restored some of Congress's oversight authority over nuclear cooperation agreements, which had been invalidated as a result of the Supreme Court's 1983 Chadha decision.

This renewed congressional oversight comes at a particularly important time, because before us is what I think we all agree a very controversial nuclear cooperation agreement, whose language in many instances is very unorthodox or ambiguous.

In other words, if ever there were a nuclear cooperation agreement that cried out for a close review by the Congress, it is the U.S.-PRC agreement.

Now let me say at the outset, Mr. Chairman, that I favor closer economic ties with the PRC.

I agree with those who say that we should have a healthy trade relationship with the PRC. I think it serves the interest of both nations.

Clearly, the United States stands to benefit from energy technology transfers to the PRC in terms of expanded trade opportunities, improved diplomatic relations, and increased energy supplies on the world market.

But in considering these opportunities, we should not forget the fact that shipping sophisticated nuclear equipment technology, and materials to the PRC -- or any country, for that matter -- has its risks.

If the PRC misuses our nuclear trade or uses it in a way that undercuts our nonproliferation goals in other parts of the world, the United States might well end up with a national security nightmare on its hands.

Furthermore, in considering the opportunities for friendlier relations with the PRC, we should not forget the fact that the nonproliferation headaches we have had in the past with nuclear trade have been primarily with our friends.

We should not forget the fact that nuclear trade has often ended up being a source of friction and discord in our relations with individual countries. I think India is a perfect example of this fact.

For that reason, in launching nuclear trade with the PRC -- or any other nation -- we should consider two fundamental questions:

First, what kind of nuclear trading partner will we be dealing with?

And second, does the nuclear cooperation agreement we sign with this new trading partner have the ironclad provisions that are necessary to ensure that what we export will not be misused and to ensure that there will be no misunderstandings or disagreements down the road over how the accord will be implemented?

As for the first question, it appears that we may be taking a leap into the unknown with respect to how responsible a trading partner the PRC will be.

I recently asked the Library of Congress and CRS to prepare two reports for me. One was on the PRC's attitude toward treaties. And the other was on its record of compliance with the agreements it has entered into with the United States.

I would ask that the two reports be placed in the record.

Their findings, Mr. Chairman, leave me worried. The first report by the Library of Congress's Far Eastern Law Division -- on the PRC's attitude toward treaties -- states that while the PRC has recently concluded that international laws and treaties are vital to its national interest and while the PRC presently attaches great importance to abiding by international laws and treaties, there are still two major reasons why we might doubt the PRC's reliability to live up to its treaty obligations.

The first reason is that "the contemporary Chinese understanding of legality is limited," according to the Library of Congress report.

In other words, even though the PRC may now attach great importance to abiding by treaties, it's still not clear whether the PRC has a full understanding of the binding nature of treaties and will follow them as we would like them to be followed.

The second reason we might doubt the PRC's reliability to live up to treaty obligations is that its political history has been stormy, and with each change in leadership there has been a change in the PRC's attitude toward laws.

Presently, under Deng Xiaoping's leadership, the PRC may consider it in its national interest to live up to its treaty obligations. But whether or not this policy "will survive after Deng is gone remains unknown," according to the report.

The second report by CRS -- on the PRC's compliance record -- raises even more disturbing questions. That report states that of the 15 agreements the PRC has signed with the U.S., "China apparently has violated the terms of two accords, the grains agreement and the cultural relations agreement." And "its adherence to an aviation agreement is seen as less than complete," according to CRS.

Incidentally, the PRC's violation of the grains agreement with the U.S. probably cost U.S. farmers about $600 million in lost sales.

If the PRC's attitude toward treaties raises a lot of questions, its attitude toward nonproliferation raises even more.

Even though the PRC has changed its nonproliferation policy for the better in recent years, even though it has joined the International Atomic Energy Agency and has recently announced that it would open some of its facilities to IAEA inspection, the PRC's commitment to preventing the spread of nuclear weapons can hardly be classified as enduring.

On the contrary, serious questions remain as to whether the PRC's current commitment to nonproliferation is anything more than a commitment of convenience -- a commitment that could just as easily be reversed in the future.

The PRC's past attitude toward nonproliferation has been cavalier, to put it charitably.

In 1963, for example, a PRC government spokesman stated that "it helps peace" if nuclear weapons "are in the hands of socialist countries."

In 1965, the Beijing Review stated that "China hopes that Afro-Asian countries will be able to make atom bombs themselves."

In 1966, then Premier Zhou En-lai stated that "nuclear weapons cannot be monopolized."

In 1978, Foreign Minister Hua Huang stated that non-nuclear countries should not be pressured "to abandon their right of possessing nuclear strength for self-defense."

These are shocking statements, Mr. Chairman. And they should not be ignored as we evaluate the PRC's present stand on nonproliferation.

Furthermore, they should not be ignored in light of persistent press reports that the PRC has aided Pakistan in nuclear weapons development, and that the PRC has made questionable or unsafeguarded nuclear exports to other nations, such as Argentina and South Africa.

Considering all the dangers associated with nuclear exports and considering all the uncertainties about what kind of nuclear trading partner the PRC will be, it is critically important that the nuclear cooperation agreement we sign with the PRC is airtight.

It is also critically important that the U.S. - PRC agreement strictly conform not only with the letter of the 1978 Nonproliferation Act but also with the spirit of that law.

However, the U.S. - PRC Agreement, as it now stands, has four major flaws:

1. Nowhere in the agreement does the PRC make a clear and unambiguous pledge to nonproliferation. In other agreements we've had such a pledge, but not with the PRC.

This is a troubling omission, Mr. Chairman, considering that country's past nonproliferation record is so suspicious.

In the PRC's case, the nonproliferation pledge should be plainly written in the agreement. It should not be a collection of dinner toasts, speeches, or secret unilateral understandings.

Think of it for a moment, Mr. Chairman. The PRC is the world's second leading communist power, which was once our bitter enemy and which refuses to sign the 1970 Nonproliferation Treaty. And here we have an agreement where there's barely a hint at any commitment to nonproliferation.

Why should other countries that now sign agreements with us make any nonproliferation pledge, when they see what the PRC has gotten away with ?

2. The PRC agreement has verification problems. The Nonproliferation Act requires that any cooperation agreement we sign with a nuclear weapons state like the PRC must have safeguards. These safeguards usually involve a thorough accounting and monitoring system for our nuclear exports.

Does the PRC agreement provide for safeguards? No. It does not, Mr. Chairman.

The agreement only calls for negotiations for some vague visitation rights down the road. If the President negotiated such a vague verification provision in an arms control agreement with the Soviets, Mr. Chairman, it would be laughed right out of the Senate.

Incidentally, it appears that our nuclear trade with Great Britain and France is governed by much tighter verification under the Euratom safeguards than what we will impose on the PRC.

3. The PRC agreement contains a provision that seems to say that the PRC can ignore any future U.S. nonproliferation laws that might restrict our nuclear exports.

In past nuclear agreements, there have been provisions that the agreements must comply with U.S. laws. But the PRC agreement appears to state that if down the road, the U.S. passes another version of the 1978 Nonproliferation Act -- say, in response to some new nonproliferation threat like the India nuclear explosion was in 1974 -- PRC officials could say the new law doesn't apply to their country under this agreement.

I'm not the only one who has raised this concern, Mr. Chairman. The Nuclear Regulatory Commission, in an unclassified response to questions I raised about the agreement, states that it is also concerned that "this new provision could be read as reducing the flexibility of the U.S., including that of Congress, in enacting and implementing future legislation affecting U.S./PRC nuclear relations."

The larger problem, however, will be the effect this escape clause in the U.S.-PRC agreement has on our dealings with other countries. Will they demand this same escape clause in the nuclear cooperation agreements they negotiate or renegotiate with us?

Are we going to eventually end up with a situation where if Congress passes another Nonproliferation Act to tighten export controls, all our nuclear trading partners will feel free to ignore the Act?

I would ask, Mr. Chairman, that the letter I received from the NRC be included in the record. That letter, as the Committee will see, reveals that the NRC has serious concerns whether certain provisions in the agreement will lead to what the Commission calls "future misunderstandings" between the U.S. and the PRC.

4. The fourth flaw in the agreement is its most serious flaw, Mr. Chairman. The Nonproliferation Act requires that a cooperation agreement have a clear and unambiguous guarantee that the United States has veto rights over another country reprocessing our spent fuel to extract its bomb-usable plutonium.

Does the PRC agreement have this clear-cut guarantee? No, it does not, Mr. Chairman.

In effect, the State Department has punted on this question. All the agreement says is that both sides will negotiate the veto rights down the road, after the PRC has warehouses full of our spent fuel piled up and ready to reprocess.

When that time comes, the agreement is worded in such a way that it would be very difficult for us to veto any plans by the PRC to extract the bomb-usable plutonium from our spent fuel.

As I've said, Mr. Chairman, there are benefits from expanded trade with the PRC.

But there are serious risks involved with nuclear trade, and this agreement does not appear to lessen those risks.

Its loose language sets us up for negotiating headaches and nonproliferation nightmares in the future -- particularly with the reprocessing provision.

Its ambiguous verification provision will make it difficult for us to ensure that the PRC complies with the agreement.

And finally, the agreement sets a dangerous precedent for our nuclear policy with our other trading partners. What will happen when our other allies -- the ones who've always been our friends -- come to us and ask for the same concessions we've granted the PRC?

Are we going to tell them, no. We can only allow the PRC to have these lax provisions? Are we going to say that the PRC will be held to a lower nonproliferation standard than our other nuclear trading partners?

Of course not.

For these reasons, Mr. Chairman, I strongly urge that the Committee call on the President to resubmit this agreement with a waiver.

I also believe that the secret understanding the Administration has reached with the PRC should be made public.

This secret understanding reportedly is the PRC's commitment to nonproliferation. If that commitment is worth anything, it should be made public by the PRC.

And finally, Mr. Chairman, I do not believe this agreement should go into effect unless we have further ironclad assurances that any nuclear exports we might make to the PRC in the future won't create nonproliferation nightmares.

If that means going back to the PRC to renegotiate the agreement, or reaching further amendments or public understandings between both countries, so be it.

This agreement is much too important, its implications for future generations are much too critical, to leave all these loose ends, Mr. Chairman.

Thank you.

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Attention: Carole Kuntz

Dear Senator Proxmire:

In response to your recent request, I am sending you a report on the subject of China's attitude to treaties. Since I understand from Ms. Kuntz of your staff that you are interested in this question in relation to the U.S.-China nuclear accord, I am including a short section on that accord.

I hope this information will be of use to you. Please let me know if I can be of further assistance.

Sincerely yours,

Tao-tai Hsia, Chief
Far Eastern Law Division

Enclosure

Hon. William Proxmire
United States Senate
530 Dirksen Senate Office Building
Washington, D.C. 20510

THE PEOPLE'S REPUBLIC OF CHINA AND TREATY OBSERVATION

1. Chinese views of international law

International law in general and treaties in particular have in recent years been seen as vital to China's interests. Under the leadership of Deng Xiaoping, China's most important goal today is modernization. Deng made a policy statement in December 1978, at the Third Plenum of the 11th Party Congress in which he stressed the importance of international law for this modernization program. This statement was made on the eve of the watershed decision to lauuch China's "socialist modernization," and stressed that special attention to international law is a necessary component of this modernization as China opens to the outside world. [1] The Chinese realize that stability in international relations is vital to their modernization goals and that international law will play a key part both in achieving stability and facilitating trade and other exchanges. Treaties and agreements are seen in the PRC as the most important sources of international law.

One of the key works on international law in the PRC was written collectively by a group of very prominent scholars. It states:

> Because treaties have a binding force on the nations which are signatories and, according to the principle of international law, pacta sunt servanda, nations are obligated to observe treaties. If we can affirm that international law is based upon agreements between nations, and treaties are clearly stated agreements between nations, then, in that sense, treaties are the most important primary sources of international law. [2]

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[1] Described in Tao Zhenghua, "Opening to the Outside Necessitates Strengthening Studies of International Law," 1985:1 Faxue yanjiu [Studies in Law] 83 (Feb. 1985).

[2] Wang Tieya and others, Guoji fa [International Law] 27 (Beijing, Legal Press, 1981). Wang Tieya is the most respected living professor of international law in the PRC. He is Professor of Law and head of the Institute of

Another Chinese jurist has written that the principle that treaties must be observed is derived from international customary law and that nations that do not abide by their treaties should be condemned by the other parties to their agreements. [3]

Once in force, treaties concluded with other countries are considered to be a part of Chinese law. An authoritative book on Chinese jurisprudence states:

> After the treaties become effective, having been concluded or adhered to by China, they shall have binding force on government agencies, public functionaries, and citizens of China, with the force of law. Although treaties do not fall within the scope of domestic Chinese law, as to their having some binding force, the treaties are a form of Chinese law. [4]

The record of the PRC in living up to its obligations under treaties and contracts concluded since 1949 is considered good. Although there have been no major recent accusations that the PRC has not met treaty obligations, U.S. Secretary of State John Foster Dulles in 1955 charged that the Chinese had not complied with an agreement on the return of civilians that had been worked out at ambassadorial talks. The Chinese disputed the

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International Law at Beijing University, the most prestigious university in the country. He is also vice-president of the Chinese Society of International Law, Chairman of the Center for the Study of American Questions, and the author of many books on law. He is one of ten living jurists with biographies in the volume on law of the Encyclopedia of China (Beijing, China Encyclopedia Press, 1984).

[3] Li Haopei, "Discussing the Principle That Treaties Must Be Faithfully Observed," 1985:1 Faxue zazhi [Journal of Legal Studies] 16, 20. Li Haopei is also a well-respected international law expert. He is legal advisor to the Ministry of Foreign Affairs and a part-time professor at Beijing University. His biography is another of the ten sketches about jurists in the Encyclopedia of China.

[4] Faxue jichu lilun [Basic Theories of Law] 365 (Beijing, Beijing University Press, 1984).

charge. This agreement was relatively informal in nature, however, and occurred at a time when there were no diplomatic relations between the two countries. [5]

In China, treaties are reviewed by the Foreign Affairs Committee of the National People's Congress (NPC) and go to the Standing Committee of the NPC for approval. [6] While the latest Chinese constitution, that of 1982, strengthens the NPC and widens its role somewhat, the NPC still largely echoes the desires of the party and state leaders.

Given this attitude toward the importance of international law and the Chinese view that treaties become a part of domestic law and binding on all officials, there are still two major reasons why one might doubt the complete reliability of the Chinese in living up to treaty obligations. The first is that the contemporary Chinese understanding of legality is limited. The second, related to the first, is the strong connection between law and policy and the susceptibility of the latter to political change.

2. The understanding of legality

The Chinese view of law, both traditionally and in recent years, is quite different from the Western view. Laws are usually written in very general terms, with much more left to individual circumstances and personalities than in the West. Frequently, an extremely broad law will be promulgated, to be followed a year or more later by somewhat more detailed implementation regulations. This was the case, for example, with much of the legislation enacted since 1979 to facilitate foreign trade, including the Joint Venture Law, the Trademark Law, and the Patent Law. In the interim, decisions are made on a case by case basis, and it can be difficult for outsiders to know what the rules will be in practice. In some cases, provisions are deliberately left vague, so as to allow flexibility in interpretation. [7] This style of law-writing carries over into treaties and proposals. For example, in 1981 an offer of certain guarantees to Taiwan, should there be peaceful reunification, was made. In it is the statement that Taiwan could retain its armed forces. Whether or not they would be under the command of Beijing was not made clear. [8]

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[5] See 2 J. Cohen and H. Chiu, People's China and International Law 1211 (Princeton, Princeton U. Press, 1974). The best-known dispute over a contract is the Baoshan Steel Mill case. See Weil, "The Baoshan Steel Mill: A Symbol of Change in China's Industrial Development Strategy," China Under the Four Modernizations, Part I 365, 384-385 (Joint Economic Committee Print, 1982).

[6] Art. 67, para. 14, Constitution of the People's Republic of China, 1982.

In addition to having a different tradition of the way laws should be written, the level of understanding of basic concepts of legality is not high. One example is the often-quoted formula for the administration of Hong Kong after China regains sovereignty in 1997: one country, two systems. Hong Kong, under the Sino-British declaration of 1984, is to retain, in basic outline, its current economic system, while the rest of China develops "socialist modernization." The legal basis for this proposal is said to be

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[7] This can be said to be true of the State Secrets regulations, enacted in 1950 and 1951, and still in effect. See Hsia, Hambley, and Johnson, "Introduction to the State Secrets Laws of the People's Republic of China," 2 China Law Reporter 267 (Fall 1983).

[8] Statement of Ye Jianying, then Chairman of the Standing Committee of the NPC, Sept. 30, 1981, reprinted in 24:40 Beijing Review 10-11 (Oct. 5, 1981).

Article 31 of the Chinese Constitution, enacted in 1982. That Article does provide for the establishment of special administrative regions with a degree of independence, to function under basic laws established by the NPC. There is nothing in the Constitution, however, to suggest that the basic laws or any regulations enacted in such regions could be in conflict with other provisions of the Constitution. Since some of those other provisions concern the protection of the socialist economy and the Preamble talks about upholding the socialist path, it is hard to see how "one country, two systems" can be constitutional. Furthermore, Chinese citizens residing in Hong Kong after 1997 will, it has been promised, enjoy certain rights not now extended to citizens in the rest of China--freedom of residence, the right to strike, and liberty to raise a family. Yet Article 33 of the Constitution says that all citizens are equal before the law. That Chinese leaders and jurists have not seen these difficulties suggests a lack of understanding of the concept of legality. It could therefore be argued that the fact that treaties become a part of Chinese law is not totally convincing evidence that they will be well understood and followed.

3. Law and politics

In the PRC, when there is no law, policy prevails. This general principle was incorporated into the Chinese Communist Party directive issued in 1949, on the eve of the conquest of the mainland, which abolished the laws of the Nationalist Kuomintang regime and affirmed the legal system that had been in place in the areas controlled by the Communists. 9/ A noted contemporary jurist, after discussing this directive, describes the role policies play by stating that they are to be followed by the people and that if cadres violate policy they are committing serious mistakes. 10/

In a legal treatise designed to popularize knowledge of the law, it is argued that where the law is incomplete, policy functions as law. As proof of the binding nature of policy, the authors point to the Organic Law of the Local People's Congresses and Local People's Governments of the PRC. Article 8 of this law, in describing the functions of the people's congresses of towns and communes, states that they are to enforce "the Constitution, laws, policies, decrees, and orders of the state...," thus listing policies together with other legal documents. 11/ In another provision, the law gives the standing committees of the people's congresses of provinces, autonomous regions, and municipalities the right to make local statutes, provided they do not contradict "the Constitution, laws, policies, decrees, or administrative orders of the state...." 12/ Policies, however, are political in nature, and can change with any change in leadership.

9/ Directive Regarding the Abolition of the Kuomintang's Complete Book of Six Codes and the Affirmation of the Legal Principles in the Liberated Areas, February 1949, quoted in Chen Shouyi, "Thirty Years of China's Legal Studies," Zhongguo Faxue Wenxuan [Collection of Essays on Chinese Law] 14 (Beijing, Legal Press, 1984).

10/ *Id.* at 24.

11/ Art. 8, § 1, translated in Foreign Broadcast Information Service, *Daily Report: China*, July 30, 1979, supplement, at 3.

12/ Art. 27, *id.* at 7.

For years the slogan "politics in command" was frequently cited in China, and even today, the term zhengfa [political-legal] is sometimes in contexts where a Westerner would use "law." The law schools that are operated as independent institutes by the Ministry of Justice, for instance, are known as Zhengfa xueyuan [usually translated Institutes of Politics and Law].

The political history of the People's Republic has been stormy, and changes of leadership and policy have been frequent. With each major change, the fundamental law of the state, the Constitution, has also changed. [13] In the middle 1950's under Mao Zedong and Liu Shaochi's leadership, China began to build a Soviet-style centralized economy. Later, with Liu out of favor, Mao moved farther and farther toward a radical political style, attacking the centralized bureaucracy, and putting power in the hands of revolutionary committees and the communes. The legal structure was also built up in the mid-fifties, attacked in the late fifties, and all but destroyed in the Cultural Revolution years (1966-76). By the late seventies, with an aging Mao increasingly under the control of the left-wing group later reviled as the "Gang of Four," Chinese legal institutions, from law schools to procurators' offices, were in disarray. Mao died in 1976 and Hua Guofeng took over. The members of the Gang of Four were arrested, but the policies of the Cultural Revolution were not fully repudiated. Since Deng Xiaoping's ascendancy, however, the policies of strengthening the legal system, regularizing state administration, separating government and party leadership, reform of the economy, and the open door for foreign trade have been implemented.

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[13] Constitutions were enacted in 1954, 1975, 1978, and 1982. The 1954 Constitution was essentially suspended long before the next was adopted; a draft Constitution was prepared in 1970 but never promulgated. In recent years, the adoption of a new state Constitution has been preceeded by the adoption of a new Chinese Communist Party charter. There were new charters, reflecting political changes, in 1973, 1977, and several months before the Constitution in 1982.

The observation of treaty obligations is advantageous to China under the current policies and is consistent with the stress on the role of law in society. Whether or not the policies will survive after Deng is gone remains unknown. He has tried to prepare the way by moving like-minded, younger officials into responsible positions, but there is still some opposition. If the continuation of his programs were assured, perhaps Deng himself, now 81, would feel secure enough to retire. As it is, the one exception to Deng's own rule of separation of party and state is the Central Military Commission, one of the most powerful bodies in China today. It is the one "parallel" organ, with identical membership, in both the state and party structures, and Deng retains personal control of it.

4. The Nuclear Accord

There has been some discussion in the last few months of whether or not China should have given further written assurances about such issues as various forms of safeguards, including inspections, even after the draft agreement on nuclear cooperation was initialed during President Reagan's 1984 trip to China. Statements on China's willingness to allow inspections, for example, have been included in agreements concluded or initialed recently with Argentina, Brazil, and Japan, but are not in U.S.-China accord. China's resistance to putting on paper what it has been pledging orally to the U.S. probably derives from sensitivity to questions of equality in foreign affairs. China and the U.S. are both nuclear weapons powers, a fact which is noted in the accord, and therefore the Chinese might argue that they should be treated as equals in all respects. Requests by the U.S. for further written assurances would be seen as demeaning. Yet once the accord was signed, the Chinese did announce a willingness to allow the International Atomic Energy Agency (I.A.E.A.) to inspect non-military nuclear installations. Zhou Ping, Deputy Minister of China's Ministry of Nuclear Industry, stated that the decision to allow safety inspections was an independent one, "not the result of any bilateral negotiations." [14] Zhou's statement reveals China's desire that any move to allow I.A.E.A. oversight not be seen as due to American pressure.

Chinese leaders have stated that their policy is to oppose nuclear proliferation; such statements of policy do have some legal force. In addition, under the present modernization program, China has much to lose in future assistance and goodwill if it applies imported nuclear technology to military projects or assists non-nuclear states in developing weapons. On the other hand, if there were a radical change in the leadership and political climate, these incentives to observe the treaty could disappear. Much depends on whether a smooth succession can be made to a new generation of leaders with essentially the same outlook as Deng Xiaoping. The fact that Deng has stressed the need to institutionalize policy, strengthen the legal system, and separate party and state, together with the popularity of his economic reforms and the desire of the people for stability, improves the probability that Deng's policies will be continued. For the present, should the U.S. seek to obtain further assurances from the Chinese, the best approach would probably be quiet diplomacy, and the most likely outcome would be additional general nuclear policy statements that are not tied directly to the U.S. agreement.

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[14] New York Times, Sept. 25, 1985, at A6.

Prepared by Tao-tai Hsia, Chief
and Constance A. Johnson, Legal Research Assistant
Far Eastern Law Division
Law Library, Library of Congress
October 1985

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

September 16, 1985

TO: Honorable William Proxmire
Attn: Doug Waller

FROM: Larry Niksch
Specialist in Asian Affairs

SUBJECT: China's Compliance With Agreements Entered Into With the United States

As of January 1, 1985, agreements in force between the United States and the Peoples' Republic of China (P.R.C.) numbered 15. (See attached list from Treaties in Force). Moreover, several of these, like the Scientific Cooperation agreement, are "umbrella" accords under which the two government have negotiated implementing agreements. Our research and discussions with State Department officials and other knowledgable individuals indicate broad but informal agreement that China has complied with most of these agreements, but that China apparently has violated the terms of two accords, the grains agreement and the cultural relations agreement. Its adherence to the aviation agreement currently is seen as less than complete. The following is a description of these three cases.

U.S. -China Long-Term Grains Agreement: Under the grains agreement, which covered the period 1981-1984, the Chinese government agreed to purchase six to eight million metric tons of wheat and corn in each year of the accord. China fulfilled this obligation in 1981 and 1982. However, the Chinese government halted purchases of U.S. grain in February 1983 following action by the U.S. Government to impose ceilings on 32 categories of imports of Chinese textiles into the United States.

The P.R.C. government resumed purchases in September 1983 after the U.S. and Chinese governments signed a new textile accord. Total purchases for 1983, nevertheless, were 3.8 million metric tons, or 2.2 million metric tons below the six million metric ton floor.

China also fell short in its purchases of grain in 1984. Total purchases amounted to four million tons. This was partly attributed by U.S. officials to the large Chinese grain harvest of that year.

The Chinese government argues that it fulfilled the grains agreement because large purchases in 1981 and 1982 resulted in an annual average purchase of over six million metric tons. U.S. officials note, however, that the grains agreement set a purchase figure for each of the four years.

Cultural Relations Agreement: In April 1983, the U.S. Government granted political asylum to Hu Na, a member of the Chinese national tennis team who defected in 1982 while in New York. The Chinese government responded by cancelling nine cultural exchange programs that had been agreed to under the U.S. - P.R.C. Cultural Relations agreement. China also refused to negotiate any new exchanges. The P.R.C. government ended its action in October 1983 when it agreed to resume cultural exchanges after negotiations with the State Department.

Aviation Agreement: Under the U.S. -P.R.C. Aviation agreement, the Chinese government is to allow two U.S. airlines to establish regular service to the P.R.C. The Chinese government initially granted rights to Pan-American Airways (Pan-Am), but it threatened in 1983 to revoke Pan-Am's rights when the airline resumed service to Taiwan. The Chinese government reportedly asked the U.S. Government to replace Pan-Am with another airline, but the U.S. Government refused.

The P.R.C. government did not carry out the threat against Pan-Am, but it has withheld full service rights from Northwest Orient, which also services Taiwan. Since 1984, the Chinese government has granted Northwest Orient temporary six month permits. The U.S. State Department currently is negotiating with Peking over Northwest Orient's status.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

October 2, 1985

The Honorable William Proxmire
Committee on Banking, Housing and
Urban Affairs
United States Senate
Washington, DC 20510

Dear Senator Proxmire:

In response to your letter of August 30, 1985, enclosed are the Nuclear Regulatory Commission's (NRC) answers to the four questions you raised concerning NRC's views on the proposed U.S./People's Republic of China (PRC) Agreement for Cooperation. As you know, on July 19 the NRC forwarded to the President a classified letter which set forth the Commission's views on the overall U.S./PRC arrangement. Some of the issues raised in your letter are addressed in detail in our letter to the President. However, since you have requested an unclassified reply, the extent of the enclosed responses must be limited, particularly with regard to the answers to Questions 1 and 2.

Should you have additional questions, please advise us.

Sincerely,

Nunzio J Palladino

Nunzio J. Palladino

Enclosure:
Questions & Answers

RESPONSE TO SENATOR PROXMIRE REGARDING NRC'S VIEWS ON THE PROPOSED U.S./PRC AGREEMENT FOR COOPERATION

QUESTION 1: In discussions with the PRC a month before the President approved the nuclear cooperation agreement, the United States Government received assurances from the PRC, which, according to the July 19, 1985 public Memorandum For The President by the Arms Control and Disarmament Agency, were "needed to clarify certain matters related to implementation of China's nuclear policies." Is the Commission completely satisfied with these private assurances? Are these assurances as firm as the Commission would like them to be so there is no possibility for misunderstanding between the two nations in the future?

ANSWER:

The Commission is concerned with the assurances provided by the PRC. As presently constituted, they could lead to future misunderstandings. Because these concerns involve classified information, we are unable to discuss them in detail in this response.

QUESTION 2: There have been a number of press reports that the PRC has aided Pakistan in the development of nuclear weapons. In light of these reports, has the Commission reached a firm conclusion that the PRC in the future will do no damage to U.S. nonproliferation objectives? There have also been press reports of questionable or unsafeguarded nuclear exports by the PRC to other nations, such as Argentina and South Africa. Is the commission fully satisfied that all future nuclear exports by the PRC to South Africa, Argentina or any other nation will be made with International Atomic Energy Agency safeguards and other appropriate nonproliferation conditions?

ANSWER:

The Commission cannot comment on this question in an unclassified fashion.

QUESTION 3: Is the Commission fully satisfied that Article 5 (2) of the U.S./PRC Nuclear Cooperation Agreement represents a clear and unambiguous statement of U.S. consent rights for the subsequent reprocessing or enrichment by the PRC of U.S. nuclear material transferred pursuant to the agreement?

ANSWER:

Although we believe the requirements of Section 123 of the Atomic Energy Act are satisfied, the Commission would have preferred that the agreement contain a clear statement of U.S. consent rights for the subsequent reprocessing or enrichment of U.S.-supplied nuclear fuel or fuel used in U.S.-supplied reactors. Such a statement could eliminate the potential for future misunderstanding.

QUESTION 4: Article 2 (1) of the Agreement contains a provision not found in previous nuclear cooperation agreements that the U.S. has signed. The provision states: "The parties recognize, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." What is the Commission's view on the effect of this provision on the authority of Congress to enact future legislation that might affect activities covered under the U.S.-PRC Agreement? How might this provision affect the flexibility of U.S. nonproliferation policy in the future, particularly as it relates to the PRC?

ANSWER:

The Department of State takes the view that the provision you have cited reflects a principle of international law contained in Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties, which codified customary law relating to treaties. The U.S. has signed but not yet ratified that Convention. The Commission is concerned that this new provision could be read as reducing the flexibility of the U.S., including that of Congress, in enacting and implementing future legislation affecting U.S./PRC nuclear relations. However, we believe that subsequently enacted domestic legislation that was inconsistent with the provisions of the Agreement would have priority.

Senator **Evans**. I thank the Senator from Wisconsin.

I know of no one in the Senate who has, for a longer period of time, been concerned about this and associated issues, and I appreciate very much your appearance before this committee.

I would like to ask this. It is my understanding that in a somewhat different approach than Senator Glenn, you would suggest that this agreement be reopened or renegotiated until such time as the more explicit elements that you call for are included in the agreement. Is that essentially correct?

Senator Glenn, as I understand it, is trying to get at the same thing, not by renegotiating the agreement itself, but by having another law passed before we actually implement the agreement to require certain statements.

Senator **Proxmire**. Mr. Chairman, I am not sure that we have to renegotiate this. I think we could make a waiver determination after the 30-day period. The 30-day period has expired. It was my amendment, the Proxmire amendment, that was governing here, as I understand it, and the 30-day period has expired. I think the Foreign Relations Committee could make the waiver at this point, though.

Senator **Evans**. In your prepared statement you say that the People's Republic of China agreement contains a provision that seems to say that the People's Republic of China can ignore any future United States nonproliferation laws that might restrict our nuclear exports.

You say "seems to say." Can you be more explicit?

Senator **Proxmire**. Well, the Chinese could read it to say that. In the following paragraph I say that in past nuclear agreements, there have been provisions that the agreements must comply with U.S. laws. This agreement appears to state that if, down the road, the United States passes another version of the 1978 Nonproliferation Act, People's Republic of China officials can say the new law does not apply to their country under that agreement.

That is the principal problem that I have with it.

Senator **Evans**. In a circumstance like that, however, don't we still retain control, under the agreement, by a unilateral refusal on our part to export? We can consummate the agreement if we assert that the new laws in fact do apply.

Senator **Proxmire**. Well, the difficulty is that they will have the reprocessed fuel. They will have it available.

They also have the technology and understand it, and they could spread it to other countries with far feebler or with no safeguards. So they are in the de facto position where we will not be able to control it at that point.

Senator **Evans**. And that all would depend, of course, on how far down the line we have gotten before any new such laws are passed.

Senator **Proxmire**. That's right.

Now it is true that China, in the last 2 years, has changed its previos proliferation policy. And it was a proliferation policy. In the last 2 years, it has greatly improved.

As we all know, the leadership in China is very old. It could change this year, next year, but it will almost certainly change soon. We hope and pray that it will change in a more pacific direction, but it might not.

So under those circumstances particularly it is very important that we have in writing an agreement just as firm as possible for compliance on the same terms that we have required from our NATO allies.

Senator EVANS. Again, in your statement, you say that incidentally, it appears that our nuclear trade with Great Britain and France is governed by much tighter verification under the Euratom safeguards than what we will impose on the People's Republic of China. You say "it appears." Can you be any more certain than that or more explicit?

Senator PROXMIRE. Well, I say "appears" because we do not know yet what the agreement is finally going to be with the People's Republic of China. But the visitation rights seem loose and in view of the fact that we have not been able to get the kind of specific agreement that this Senator, at least, would prefer, it seems to me that it is likely that they will be far looser than they are with France and England.

Senator EVANS. I don't know if you heard or have seen the several specific proposals in the proposed legislation of the Senator from Ohio. I wonder if those deal with essentially the same issues or concerns that you are expressing?

Senator PROXMIRE. I think that Senator Glenn's statement was a very, very good one, as you would expect from Senator Glenn, for whom I have great admiration and respect. But I have not seen the legislation in detail. But I do think that anything that would plug the loopholes in the agreement would be helpful, and I think he has made a good, solid, constructive recommendation.

Senator EVANS. As I understand what he is suggesting, it is that we not deal explicitly with the current pending agreement; but rather it is his hope that legislation calling for the four explicit statements or additional clarifications be made part of separate U.S. law prior to the final adoption of this agreement.

Senator PROXMIRE. Well, I think it is a good idea to tighten up our understanding with the State Department, that is, Congress and the administration. But I think we ought to tighten up firmly, much more than we have, our agreement with the People's Republic of China.

Senator EVANS. Can you tell us what, in your view, would be achieved by the President resubmitting the agreement with a waiver of section 123(a) requirements?

Senator PROXMIRE. Well, No. 1, we would have a clear up and down vote on this. We would have an opportunity to determine whether or not this agreement should go forward. And I think we would have a real opportunity to either not export nuclear knowhow, materials, and equipment to the People's Republic of China or we would be able to get with the People's Republic of China an agreement that would be far better from the standpoint of preventing proliferation and much better from the standpoint of preventing this kind of precedent from going into effect.

If we have this kind of loose, easy agreement with the People's Republic of China, there is no way we can make it tough for anybody else. This is the No. 1 Communist country in the world. How can we possibly turn to any other country, any weapons country, at least, and say that we go along with the Chinese but we don't go along with you.

Senator EVANS. Would you be satisfied with specific or explicit safeguards and statements that are identical to those we now apply to other nuclear weapon states?

Senator PROXMIRE. Yes, but they would have to be in writing, as they are, the others.

Senator EVANS. It would be helpful, I think, for the committee if you had an opportunity to look at Senator Glenn's proposals with specific emphasis on the four points that he is suggesting and let us know if those four points encompass the concerns that you have or whether there are others that we should consider in looking either at proposed additional legislation or at some modification of the agreement.

Senator PROXMIRE. I appreciate that suggestion very much, Senator Evans, and I will be very happy to do that. We will go right to work on it and we will have to you in the next couple of days.

Senator EVANS. I appreciate your appearance here very much.

Senator PROXMIRE. Thank you, sir.

Senator EVANS. I thank the Senator from Wisconsin.

We will recess this hearing until 2 o'clock this afternoon. Our witnesses then will include Senator McClure and Senator Cohen and then the Honorable John Herrington, Secretary of Energy.

[Whereupon, at 10:25 a.m., the committee recessed to reconvene the same day.]

AFTERNOON SESSION

The committee met at 2:22 p.m., in room SD-419, Dirksen Senate Office Building, Hon. Richard G. Lugar (chairman of the committee) presiding.

Present: Senators Lugar and Cranston.

The CHAIRMAN. This hearing of the Senate Foreign Relations Committee is resumed.

We appreciate the cooperation of all witnesses and participants to allow us a period to greet the distinguished Foreign Minister of Singapore. We have completed a luncheon with the Foreign Minister and the distinguished members of the House Foreign Affairs Committee.

Senator Cohen of Maine is now here.

I appreciate your patience, Bill, in waiting for this to resume and your interest in this subject.

Would you please proceed with your testimony.

STATEMENT OF HON. WILLIAM S. COHEN, A U.S. SENATOR FROM MAINE

Senator COHEN. Thank you very much, Mr. Chairman. I appreciate having the opportunity to carry on a dialog with the chairman of the Foreign Relations Committee.

As the chairman knows, I have been concerned with this nonproliferation issue for some time now, and serve, along with Senator Glenn, on the Energy Nuclear Proliferation and Government Processes Subcommittee of Government Affairs, and for a number of years have worked fairly closely with Senator Glenn and others on similar issues.

I would like to say that the package which Congress has been presented, the agreement and the accompanying documents and understandings, I think, poses both opportunity and risk. I think it offers the opportunity to significantly advance the U.S. nonproliferation objectives, and at the same time I think it poses risk of future misunderstandings with China, difficulties with our partners in the international nonproliferation regime, and potentially even lasting harm to the regime and to our own security.

I understand that Senator Glenn did make a presentation this morning and has proposed certain legislation. Frankly, I support the goals of that legislation, but have some modifications that I would like to discuss for a few moments here this afternoon to try to build on what I see as a constructive proposal by Senator Glenn.

I might point out to the Chairman that recently I had occasion to travel to the People's Republic of China along with Senator Dole and others, and we were treated with great generosity and graciousness and left with an attitude that we certainly have a strong relationship that is in the process of building, and we left on a very positive note that we can, in fact, reconcile a number of differences that we have.

So, it is within that tone that I would like at least to offer some comments concerning this particular agreement.

I would point out that the People's Republic of China historical attitude toward nuclear nonproliferation can hardly bring any comfort to those who are concerned about the spread of nuclear weapons. As the administration documents discuss, the People's Republic of China has consistently opposed both the concept and the reality of the international nuclear nonproliferation regime.

I realize that many of those Chinese declarations that are discussed in the ACDA documents, for example, were made during the 1960's and the 1970's and during the height of the Cultural Revolution, and we are now in the Deng era. Nonetheless, I think if it were only a question of words, we would not be as concerned as we are and ought to be, based upon Chinese actions.

I think there have arisen justifiable concerns as the People's Republic of China has become involved in international nuclear commerce activities. I think events of the last few years have demonstrated this concern to be fairly well founded.

The committee knows that there have been reports that the People's Republic of China has provided Pakistan with assistance in acquiring uranium enrichment capabilities and with detailed nuclear weapons design information. Significantly those reports indicated that such enrichment assistance continued even after the United States-People's Republic of China nuclear cooperation agreement was initiated during President Reagan's visit to Beijing in April 1984.

There are other reports which indicate that the People's Republic of China has provided enriched uranium to Argentina and may have provided heavy water to India, Argentina, and South Africa, and also enriched uranium to South Africa.

I would make a personal recommendation, Mr. Chairman, that these reports not simply be cited as news items, which may or may not be substantiated. But I would recommend that the chairman and other members of the committee also have the benefit of an intelligence briefing by the intelligence community to verify the validity or nonvalidity of those reports.

I think all of this does highlight the critically important opportunity associated with these understandings that accompany this agreement. These understandings are contained in a document entitled "United States Summary of Discussions."

If the United States summary accurately reflects the People's Republic of China nonproliferation policies, and, in fact, they were to adhere to those policies, I think this would mark a very significant step toward the strengthening of the nonproliferation regime.

But there are questions, I think, that have been discussed this morning, which I will reiterate for just a few moments today.

I think because of the very fact that this is a U.S. summary and not a People's Republic of China summary, a good deal of uncertainty remains as to whether this faithfully reflects the People's Republic of China nuclear nonproliferation policies. I think whenever we have unilateral understandings, the experience has not been a very positive one.

I might point out that we had similar experiences in SALT I, with our unilateral interpretation as to what a heavy missile was and what a light-heavy missile turned out to be, in the form of an SS-19.

During a similar type of discussion that I had during a hearing in 1983, I asked a question of Mr. Adelman as to what his experience has been when there has been a disagreement between two major countries over an interpretation of a treaty provision. Mr. Adelman said the following:

> My experience has been that they just talk about it forever, until the accusing party decides to forget it. It has not been a happy experience.

I would submit to you that we are laying open the possibility of a similar type of disagreement in the future as long as we only have a unilateral United States understanding of what the People's Republic of China policies are. So I would hope that the committee would insist upon a written reaffirmation in one form or another from the People's Republic of China that this does, in fact, reflect their nuclear nonproliferation policies.

There are a number of other issues such as the United States prior consent rights, required by U.S. law, over potential People's Republic of China reprocessing or enrichment activities involving United States-supplied materials or facilities.

Regarding the committee's approach to all of these matters, I would simply say that the committee should seek to accomplish three things: To dispel the uncertainty as to whether the U.S. Summary of Discussions is a faithful representation of the People's Republic of China nuclear nonproliferation policy; No. 2, to clarify the ambiguities in the agreement that appear to exist; and No. 3, prevent the unorthodox aspects of this agreement from serving as a precedent for future nuclear cooperation agreements.

I have already distributed to the committee what my proposals would contain. I will not take the time to go through them here. But, again, I would propose, on the first item, that no nuclear export license be issued for the People's Republic of China until the President provides the Congress with a written statement prepared by or signed by the People's Republic of China reaffirming in all essential elements and details its nuclear nonproliferation policy views as expressed in the Bejing discussions and contained in the United States Summary of Discussions.

Second, with respect to prior consent rights, I think that the administration has told the Congress that these provisions, by which the United States undertakes to favorably consider such activities, will not prejudice the decision of the United States with regard to arrangements for such activities.

As I understand it, the words "favorably consider" is perhaps diplomatic in nature. But basically what the State Department has said is that this does not prejudice the U.S. opportunity to, in fact, reject such a request for reprocessing or future use.

My own interpretation of those words would lead me to believe that they should have used the words "give fair consideration" to any request by the People's Republic of China to engage in enrichment activities and so forth. The words "favorably consider," I think, can be subject to some misinterpretation. But as long as it is certified that what the State Department has indicated to Congress in fact is the case, I think that would satisfy at least my own concerns in this area.

On guarantee of peaceful use, the NNPA also requires a guarantee that safeguards as set forth in the agreement will be maintained.

Now there are various statements contained in the agreement and, in particular, in article 8, for information exchanges, and visits. But there is very little by way of details so far as implementing those provisions.

I would propose that we grant no nuclear export license to the People's Republic of China until the President certifies to the Congress that the arrangements made pursuant to article 8 will be essentially equivalent to that provided by the materials accounting and inspection standards normally applied by the IAEA.

The third item that I mentioned is the unusual nature of this agreement, the sui generis nature of it. This is the first agreement by the United States with a Communist country and the only one with another nuclear weapons state, and I think it is unique. I believe that you should state in your findings that the agreement is, in fact, sui generis, and holds no precedent for agreements for peaceful nuclear cooperation that the United States might wish to negotiate in the future.

I think that has to be made clear, that we are not setting a precedent, that this is the very unusual nature of this particular agreement.

I am hopeful that Congress will adopt, in conjunction with the legislation of Senator Glenn and whatever modifications you would wish to impose on that, a resolution of approval of the agreement. But, in the absence of legislation such as Senator Glenn and I are proposing I think there might be a compelling reason to actively support a resolution of disapproval of the agreement.

I think that if, in fact, we cannot obtain these classifications then a resolution of disapproval might very well send a very strong message to the President explaining congressional concerns. In doing so, we could invite the President to resubmit the agreement with the necessary qualifications and clarifications.

Those are my general observations on the agreement, Mr. Chairman. I would say, again, that I think we should look upon this as an opportunity with associated risks, and I think we can minimize those risks by eliminating the ambiguities. I would ask that my prepared statement be included in the record, along with my suggested modification to Senator Glenn's bill.

[Senator Cohen's prepared statement and modifications referred to follow:]

PREPARED STATEMENT OF SENATOR COHEN

Mr. Chairman,

I would like to thank you and the Committee for this opportunity to discuss the U.S.-PRC Nuclear Cooperation Agreement and the accompanying understandings which are integral to that Agreement.

I have long been concerned with U.S. non-proliferation policy and throughout my tenure in the Senate have served as a member of the Energy, Nuclear Proliferation and Governmental Processes Subcommittee of the Governmental Affairs Committee. I am deeply interested in the matter now before the Foreign Relations Committee and in how the Committee and the Congress choose to handle it.

The package with which the Congress has been presented -- the Agreement and accompanying understandings -- poses both opportunity and risk. It offers the opportunity to significantly advance U.S. non-proliferation objectives. At the same time, it poses the risk of future misunderstandings with China, difficulties with our partners in the international non-proliferation regime, and, potentially, lasting harm to the regime and our security.

My interest in this Agreement goes back several years. In July, 1983, Senator Boschwitz and I joined six other senators in writing the President to express our concern over reports of U.S.-PRC negotiations on such an agreement and to request that the matter be addressed publicly. Later that year, a hearing held jointly by this Committee and the Energy and Nuclear Proliferation Subcommittee provided an opportunity to question Administration witnesses about these negotiations. In August of this year, Senator Dole led a delegation, of which Senator Evans and I were members, to the PRC. The Chinese were quite gracious and generous to us during this visit. The Nuclear Cooperation Agreement was an important subject in our discussions with Chairman Deng and President Li, and we informed them of the serious concerns in Congress about the PRC's non-proliferation policies.

Earlier today, Senator Glenn presented the Committee with legislation to address concerns which have been raised about the

Agreement and understandings. In examining his legislation, I was pleased to find that it shares the basic objectives of the approach which I have been exploring. Senator Glenn has long been a leader on non-proliferation matters, and I believe he has provided an excellent starting point for the Committee's consideration of this matter. In my discussion this afternoon, I will offer some suggestions on how we could, in my view, constructively build upon Senator Glenn's effort.

History of PRC Attitudes on Nuclear Proliferation

The PRC's historical attitude toward nuclear nonproliferation can hardly bring comfort to those concerned about the spread of nuclear weapons. As the Administration's Nuclear Non-Proliferation Assessment Statement discusses, the PRC has consistently opposed both the concept and the reality of the international nuclear non-proliferation regime.

I recognize that many of the PRC's most worrisome declarations were made during the period of the Cultural Revolution, and that China has now entered the Deng Era. Nonetheless, these sobering facts of China's history have caused justifiable concern as the PRC has become involved in international nuclear commerce. Events of the last few years have demonstrated this concern to be well-founded.

As the Committee knows, there have been reports that the PRC has provided Pakistan with assistance in acquiring a uranium enrichment capability and with detailed nuclear weapons design information. Significantly, reports indicated that such enrichment assistance continued even after the U.S.-PRC Nuclear Cooperation Agreement was initialed during President Reagan's visit to Beijing in April, 1984. Other reports indicate that the PRC has provided enriched uranium to Argentina, and may have provided heavy water to Argentina, India, and South Africa and enriched uranium to South Africa.

I would recommend that the Committee take the opportunity to receive an intelligence briefing on these various matters.

All of this highlights the critically important opportunity associated with the understandings that accompany the Agreement. These understandings, which are contained in the State Department document "United States Summary of Discussions", concern the PRC's nuclear non-proliferation policies. If the "U.S. Summary" accurately reflects PRC non-proliferation policies and the PRC were to adhere to such policies, this would mark a significant step toward strengthening the non-proliferation regime.

Questions about the Understandings and Agreement

However, because the record of these understandings is a United States summary, not a PRC summary, uncertainty exists as to whether this faithfully reflects PRC nuclear non-proliferation policies. Other uncertainties also exist with regards to this U.S. document and PRC nuclear non-proliferation policies.

Additionally, several questions have been raised with respect to provisions of the Agreement, itself. Foremost among these are questions regarding U.S. prior consent rights, required by U.S. law, over potential PRC reprocessing or enrichment activities involving U.S.-supplied materials or facilities. Questions have also been raised about guarantees of peaceful use of materials and equipment exported to the PRC under the Agreement.

During the September, 1983, joint hearing which I mentioned, ACDA Director Adelman and I discussed situations in which the U.S. and another country have entered into an agreement without adequately clarifying the agreement's meaning:

> "Senator Cohen: Mr. Adelman, what has been your experience when there has been a disagreement between two major countries over an interpretation over a treaty provision ?

> "Mr. Adelman: My experience has been that they just talk about it forever until the accusing party decides to forget it. It has not been a happy experience."

I would agree with Dr. Adelman's assessment and recall specific instances, such as the unilateral understanding of SALT I regarding heavy missiles. In my view, it is better to make the effort to create a solid foundation for our developing friendship with China than to build that relationship upon shifting sands of ambiguity and what may amount to unilateral declarations.

Agenda for Congressional Action

I share the view that these are serious concerns that should be addressed. Congress, in my view, can play a productive role by taking action to:

- dispel the uncertainty as to whether the "U.S. Summary of Discussions" is a faithful representation of PRC nuclear non-proliferation policies;
- clarify the ambiguities with the Agreement that appear to exist; and
- prevent the unorthodox aspects of the Agreement from serving as a precedent for future nuclear cooperation agreements.

I have distributed to members of the Committee my suggested approach for accomplishing this. I have crafted this in the form of modifications to Senator Glenn's bill. He has indicated that he is receptive to the possibility of working together to fashion mutually agreeable legislation.

Let me outline the elements of this approach.

Reaffirming the Beijing Understandings

It would not be responsible, in my view, for the Congress to approve implementation of the Agreement relying upon the "U.S. Summary of Discussions", as provided to the Congress. The Congress should have a statement by the PRC itself -- rather than by another branch of the U.S. Government -- that clearly and precisely states the PRC's nuclear non-proliferation policies.

I would propose that no nuclear export license be issued for the PRC until the President provides the Congress with a written statement prepared by or signed by the PRC reaffirming in all essential elements and details its nuclear non-proliferation policy views as expressed in the Beijing discussions and contained in the U.S. "Summary of Discussions".

As I indicated earlier, even with this reaffirmation, other uncertainties may remain regarding PRC non-proliferation policies. Such a reaffirmation, however, would be useful in increasing the Congress' confidence regarding these matters.

U.S. Prior Consent Rights

The Nuclear Non-Proliferation Act (NNPA) clearly states that agreements for nuclear cooperation must include a guaranty against reprocessing or enrichment activities involving U.S.-supplied materials or facilities without prior approval of the United States. The provisions of the U.S.-PRC Agreement on this matter could invite misunderstanding unless they are clarified.

The Administration has told Congress that these provisions, by which the U.S. undertakes to favorably consider such activities, do not prejudice the decision of the U.S. with regards to arrangements for such activities. I would propose that no nuclear export license be issued for the PRC until after the President certifies the correctness of this interpretation.

Guaranty of Peaceful Use

The NNPA also requires that nuclear cooperation agreements include "a guaranty that safeguards as set forth in the agreement will be maintained". The matter of guaranty of peaceful use is addressed at various points in the Agreement, including the provisions in Article 8 for information exchanges and visits, but details regarding the implementation of these provisions are not addressed.

The Congress could accept the Agreement with less trepidation, in my view, if it knew how this guaranty would be implemented. I would propose that no nuclear export license for the PRC be issued until the President certifies to the Congress that the arrangements made pursuant to Article 8 will be essentially equivalent to that provided by the materials accounting and inspection standards normally applied by the IAEA.

Sui Generis Nature of the Agreement

The U.S.-PRC Nuclear Cooperation Agreement is unique. As the President noted in his letter transmitting the Agreement to Congress, the Agreement "is the first peaceful nuclear cooperation agreement by the United States with a Communist country and the only such agreement with another nuclear weapon state (the United Kingdom and France are covered by U.S. agreements with EURATOM)."

Accordingly, I believe it would be appropriate that, in such legislation as is being proposed, the Congress state its finding that the Agreement is sui generis, holding no precedent for agreements for peaceful nuclear cooperation that the U.S. might negotiate or enter into in the future.

Priority of U.S. Law

Article 2 of the Agreement states that "The parties recognize, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Such a statement does not occur in other recent agreements for nuclear cooperation signed by the U.S., such as the agreements with Sweden and with Norway. Nor is such a statement included in the nuclear cooperation agreement between the PRC and Japan signed in July, 1985.

The State Department and the Energy Department, in their joint memorandum to the President on the Agreement, state that they interpret this to mean: "Each party will implement the agreement in accordance with its respective applicable treaties, national laws, regulations and license requirements concerning the use of nuclear energy for peaceful purposes." According to the Nuclear Regulatory Commission (NRC) in a 10/2/85 letter responding to questions from Senator Proxmire: "The Department of State takes the view that the provision reflects a provision of international law contained in the 1969 Vienna Convention on the Law of Treaties, (which) the U.S. has signed but not yet ratified."

Additionally, the NRC states that it "is concerned that this new provision could be read as reducing the flexibility of the U.S., including that of Congress, in enacting and implementing future legislation affecting future U.S./PRC nuclear relations. However, we believe that subsequently enacted domestic legislation that was inconsistent with the provisions of the Agreement would have priority."

State Department officials have stated that subsequently enacted legislation would, indeed, be treated as having priority.

Taking these all of this into account, it does not seem necessary to include a legislative requirement that licenses be withheld until further clarification is obtained on this matter. Accordingly, I suggest that, in legislation of the type that Senator Glenn and I are advocating, the Congress simply state its finding that agreements for cooperation do not constrain the U.S. from applying all its laws and regulations which are in effect at the time of an export or licensing.

Absence of Such Legislation

I am hopeful that the Congress will adopt, in conjunction, legislation of this nature and a resolution of approval of the Agreement. In the absence of such legislation, however, I believe there might be compelling reasons to actively support a resolution of disapproval of the Agreement.

While I sincerely hope that it would be unnecessary, I believe such a resolution of disapproval could be adopted in a productive manner. For example, it might be accompanied by a congressional statement explaining congressional concerns and inviting the President to resubmit the Agreement, once the necessary clarifications can be provided.

Conclusion

There are few other areas of foreign policy in which the Congress has played as integral a role as in nuclear non-proliferation. In my view, the many difficult and controversial aspects of this Agreement and accompanying understandings demonstrate the wisdom of the Congress' decision to create an institutional framework for close collaboration between the Executive and Legislative branches on nuclear non-proliferation matters. It also indicates that we would be equally wise to continue this collaboration in the case of U.S.-PRC nuclear cooperation through legislation such as that which I have outlined.

SUGGESTED MODIFICATIONS OFFERED BY SENATOR COHEN

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S.L.C.

99th CONGRESS
1st Session

S. ____

IN THE SENATE OF THE UNITED STATES

Mr. Glenn introduced the following bill; which was read twice and referred to the Committee on ____________________

A BILL

To promote the successful implementation of the Agreement for Nuclear Cooperation between the
United States and the People's Republic of China,
~~to~~ ensure ~~adequate verification of~~ peaceful uses of nuclear
technology transfers between
~~exports from~~ the United States ~~to~~ and the People's Republic of
promote the strengthening of the international nuclear non-proliferation regime,
China,, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Sino-American Nuclear ~~Verification~~ Cooperation Act of 1985".

FINDINGS

Sec. 2. The Congress finds that--

(1) the international nuclear nonproliferation regime, including the safeguards system of the International Atomic Energy Agency (IAEA), ~~and~~ the domestic laws of the United States controlling nuclear exports, and the laws and policies of many other countries are important elements in ~~the struggle against~~

preventing the spread of nuclear weapons;

(2) nuclear trade involving nonsensitive safeguarded equipment, materials, and technology can be a useful component in the ~~an effective~~ nuclear nonproliferation policy of the United States, is of economic value to the United States and its trading partner, and helps to fulfill the obligations of the United States under the Treaty on the Non-Proliferation of Nuclear Weapons, done on July 1, 1968;

(3) it is in the common interests of the United States and the People's Republic of China to cooperate in the use of nuclear energy for peaceful purposes and to do so on a stable, reliable and predictable basis;

(4) it is in the common interest of the United States and the People's Republic of China to actively work to prevent the proliferation of nuclear weapons to non-nuclear weapon states and strengthen the international nuclear non-proliferation regime;

(5) the People's Republic of China has indicated an increasingly progressive position in the area of nuclear non-proliferation over the past year, including through its participation in the IAEA; its publicly stated policy that it will require IAEA safeguards on its nuclear exports to non-nuclear weapon states; its signing, with other nations, of agreements for peaceful nuclear cooperation which provide for IAEA safeguards; and its understandings reached with the United States in discussions held in Beijing on June 26 and 27, 1985, as contained in the Department of State document entitled "United States Summary of Discussions";

(6) the United States should encourage the People's Republic of China to enhance its participation in the international nuclear non-proliferation regime;

(7) ~~(3)~~ nuclear agreements for cooperation between the United States and other nations should be without ambiguity as to meaning or implementation and should be in keeping with the letter and spirit of the Nuclear Non-Proliferation Act of 1978 and the Atomic Energy Act of 1954, as amended;

(8) ~~(4)~~ agreements for cooperation, including the agreement between the United States and the People's Republic of China, signed on July 23, 1985, do not constrain the United States from applying all laws and regulations ~~regarding nuclear exports~~ which are in effect at the time of the export or the licensing thereof;

(9) ~~(5)~~ the national security of the United States may be put at risk by nuclear trade with nations whose nuclear nonproliferation policies are either unsatisfactory or are not sufficiently specific ~~or detailed~~ to judge whether they are satisfactory;

(10) ~~(6)~~ the transfer or retransfer of nuclear equipment, material~~s,~~ or technology to any nation without adequate guaranty of its use solely for ~~verification of their~~ peaceful ~~uses~~ purposes undermines the international nuclear nonproliferation regime and is inimical to the common defense and security of the United States; ~~and~~

(11) ~~(7)~~ the Agreement for Cooperation Between the United States and the People's Republic of China Concerning Peaceful Uses of Nuclear Energy, signed on July 23, 1985 (hereafter in this Act referred to as the ''Agreement for Cooperation''), together with ~~the Department of State~~ the understandings reached between the two governments in the Beijing discussions of June 26-27, 1985, as contained in the document entitled ''United States Summary of Discussions'' (relating to China's nuclear nonproliferation policy), ~~do not~~ can provide a sound basis for nuclear trade between the two countries ~~without~~ if these understandings and the provisions of the Agreement for Cooperation can be clarified; and ~~further clarification of~~

~~(A) the verification of peaceful uses covering exported items;~~

~~(B) the rights of consent and the exercise thereof by the United States over the enrichment of United States supplied fuel, the reprocessing of United States origin spent fuel, or the reprocessing of other spent fuel arising from a United States supplied reactor;~~

~~(C) Chinese nuclear nonproliferation policies;~~

~~and~~

~~(D) the relationship of the Agreement for Cooperation to future United States export control laws.~~

(12) the Agreement for Cooperation between the United States and the People's Republic of China, being, inter alia, the first peaceful nuclear cooperation agreement by the United States with a Communist country and the only such agreement with another nuclear weapon state, is unique and shall be considered sui generis, holding no precedent for agreements for peaceful nuclear cooperation that the United States may negotiate or enter into in the future;

PURPOSES

Sec. 3. The purposes of this Act are to-- (1) promote the successful implementation of the Agreement for Cooperation by providing for the necessary ~~(1) provide for the~~ clarification of understandings regarding the implementation of the Agreement for Cooperation;

(2) strengthen the nuclear nonproliferation regime by providing for the reaffirmation and clarification of the understandings reached betwe ~~providing an example of United States leadership in~~ the United States and the People's Republic of China in the Beijing discussions of ~~fostering more equal treatment of nuclear weapon States~~ June 26-27, 1985, as contained in the document entitled "United States Summary ~~and nonnuclear weapon States regarding conditions of~~ of Discussions"; ~~nuclear trade~~;

(3) encourage commitments by nuclear-weapon states to formal or tacit adherence to the principle of safeguards for nuclear materials, equipment, and technology used for peaceful purposes; and

(4) protect United States national security interests. ~~through strict verification of peaceful uses and full retention of United States rights of consent concerning transfers or retransfers of United States nuclear equipment, materials, and technology as well as materials derived from United States facilities~~.

Sec. 4. (a) Notwithstanding any other provision of law or

~~including~~ any international agreement, no license may be issued for the export to the People's Republic of China of any nuclear equipment, material~~s~~, or technology, and no approval~~s~~ for the transfer or retransfer to the People's Republic of China of any nuclear equipment, material~~s~~, or technology may be given by the United States until the expiration of a period of 30 days of continuous session of Congress after ~~the President has certified to the chairman of the Foreign Relations Committee of the Senate and to the chairman of the Foreign Affairs Committee of the House of Representatives that~~ --

the President has certified to the Congress that the arrangements made

(3) ~~(1) the verification of peaceful uses on exported~~

pursuant to Article 8 of

~~items covered by~~ the Agreement for Cooperation will be essentially equivalent to that provided by the materials accounting and inspection standards normally applied by the International Atomic Energy Agency, ~~in accordance with its document INFCIRC 66 Rev. 2 entitled "The Agency's Safeguard System (1965, as provisionally extended in 1966 and 1968)";~~

~~(2) the Government of the People's Republic of China has communicated its recognition that the Agreement for Cooperation neither favorably nor unfavorably disposes the United States toward approving or agreeing to any enrichment, reprocessing, or alteration in form or content of material transferred pursuant to the Agreement~~

(2) the President has certified to the Congress that, regarding the potential consultations on activities involving the enrichment, reprocessing, or alteration in form or content of material in accordance with the provisions of Article 5 of the Agreement for Cooperation, the favorable consideration of such activities which the United States undertakes is without prejudice to the decision of the United States with regards to arrangements for such activities; and

~~for Cooperation or material used in or produced through the use of any material or facility transferred pursuant to the Agreement for Cooperation;~~

(1) the President has provided the Congress with a written statement prepared by or signed by the People's Republic of China reaffirming ~~(3) the Government of the People's Republic of China has provided a public, written, detailed statement of its nuclear nonproliferation policies, and those policies correspond~~ in all essential elements and details ~~to the~~ its nuclear non-proliferation policies as expressed in the Beijing discussions of June 26-27, 1985 and ~~description of such policies~~ contained in the Department of State document entitled ''United States Summary of Discussions'' (relating to China's nuclear nonproliferation policy); ~~and~~

~~(4) the Government of the People's Republic of China has communicated its recognition that all proposed exports of nuclear materials, equipment, or technology under the Agreement for Cooperation are subject to such laws and regulations of the United States which are in effect at the time of each such export or the licensing thereof.~~

(b) For purposes of subsection (a), the continuity of a session of Congress is broken only by adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the period indicated.

RESTATEMENT OF SEC. 4 AS MODIFIED BY SENATOR COHEN'S SUGGESTIONS

Sec. 4. (a) Notwithstanding any other provision of law or any international agreement, no license may be issued for the export to the People's Republic of China of any nuclear equipment, material, or technology, and no approval for the transfer or retransfer to the People's Republic of China of any nuclear equipment, material, or technology may be given by the United States until the expiration of a period of 30 days of continuous session of Congress after--

(1) the President has provided the Congress with a written statement prepared by or signed by the People's Republic of China reaffirming in all essential elements and details its nuclear non-proliferation policy views as expressed in the Beijing discussions of June 26-27, 1985, and contained in the document entitled "United States Summary of Discussions";

(2) the President has certified to the Congress that, regarding potential consultations on activities involving the enrichment, reprocessing, or alteration in form or content of material in accordance with the provisions of Article 5 of the Agreement for Cooperation, the favorable consideration of such activities which the United States undertakes is without prejudice to the decision of the United States with regards to arrangements for such activities; and

(3) the President has certified to the Congress that the arrangements made pursuant to the provisions of Article 8 of the Agreement for Cooperation will be essentially equivalent to that provided by the materials accounting and inspection standards normally applied by the International Atomic Energy Agency;

The CHAIRMAN. Thank you very much, Senator Cohen.

Let me mention, just for the record, that a hearing was conducted by the committee yesterday, and it did deal with some of the matters that have come to us through intelligence sources. That was the reason for its being closed. The committee has been conscientious in attempting to follow through on the first of your points.

Questions were also raised with regard to the other two, and I think they are highly pertinent. Senators will differ in terms of their findings on those questions, but they need to be raised.

I would like to ask you this question.

Given the fact that you have recently been in the People's Republic of China discussing this question with responsible individuals, what would be the impact on our diplomatic relations if a resolution of disapproval were to be adopted? What would be the impact of very substantial criticism of this agreement?

In short, can you give us some feel of what is likely to be the Chinese reaction?

Senator COHEN. I think there would obviously be a very negative reaction. The People's Republic of China is looking forward to establishing this relationship with the United States. It sees it as a major opportunity to further cement this bond that is developing. I am sure they would interpret it as a direct assault upon that growing relationship.

Nonetheless, I think it is also important to point out that, in spite of those potential risks, we have to satisfy our own obligations in terms of what we feel will be in the best interests not only of the United States-Chinese relationship, but the overall situation in the world. To the extent that the People's Republic of China refuses to acknowledge the need for clarifications to satisfy these legitimate concerns, then I think they have to be put on notice.

Frankly, during the course of my brief stay of some 5 days in China, this was discussed. Senator McClure, I believe, will be testifying shortly, and he indicated very clearly to the Chinese leadership that this is coming before Congress and that it had his very strong support. I don't think I am overstating the case. By the same token, I felt compelled during my visit to point out that some of us, particularly myself, had serious concerns about the absence of the kind of safeguards that would be required to satisfy me.

So I think that they were put on notice that in this democratic system of ours, while we value the relationship between our two countries, we also have a thing called the rule of law, and our laws require something quite different, and international agreements require something quite different, than the People's Republic of China was prepared to accept; that this would be a matter of some debate, and I think that they are prepared to at least witness, if not accept, that debate.

So I think it is healthy for us to engage in this process, and I think, frankly, we are not that far apart. But I think it would be a very, very serious mistake if we were to endorse this proposal while there is the ambiguity concerning what the People's Republic of China's policies are going to be and rely upon what the State Department thinks the Chinese are thinking about. I think that would invite the possibility of a future disagreement and, frankly, if a friendship is going to founder, it has been my experience that it is better to have it founder at the outset than to start along the process and the path and be halfway there and suddenly have disagreements erupt into public arguments with a good deal of namecalling and vindictiveness being exchanged back and forth over who shot down the agreement.

I think it would be a far worse situation to have that happen at the future than at the beginning.

The CHAIRMAN. We thank you very much for coming and for your testimony, and for the modifications that you have suggested. These will be a part of our consideration.

Senator COHEN. Thank you, Mr. Chairman.

The CHAIRMAN. The Chair would like to call forward the distinguished Senator from Idaho, Senator James McClure.

Senator McClure is chairman of the committee that has a very close association with this subject and certainly jurisdiction over domestic matters that pertain to it.

We are especially pleased to have his testimony.

If you would proceed, Jim, we would appreciate it.

STATEMENT OF HON. JAMES A. McCLURE, A U.S. SENATOR FROM IDAHO

Senator MCCLURE. Mr. Chairman, thank you very much.

I am pleased to testify before your committee in support of the Nuclear Cooperation Agreement Between the United States and the People's Republic of China.

For over a year, the arguments for and against this agreement have dominated the news media. This subject has also been thoroughly discussed by both Houses of Congress. But the issue is very simple. The People's Republic of China has serious energy problems that can only be solved with considerable assistance from other countries.

The United States is China's first choice to provide the assistance in developing its nuclear technology. But if we reject this offer, there are a number of countries perfectly willing, actually anxious, to offer their advanced technology equipment and services.

The United States, not China, will be the big loser.

China will seek the assistance elsewhere and we will have lost all opportunity to influence the nuclear policies of the world's largest Communist nuclear weapons state.

Most, if not all, of the concerns that have been expressed over the past year have already been put to rest.

In 1984, China joined the International Atomic Energy Agency and was given a seat on the Board of Governors. They have committed to providing safeguards to all nuclear exports to third party countries.

More recently, and most importantly, they have voluntarily followed suit with other nuclear weapons states to open some civilian nuclear installations to safeguard inspections.

Opponents of this agreement have pointed to the verbal, rather than written, pledges by China's leaders concerning safeguard and proliferation issues. Yet I must remind you that this United States-China agreement is the only agreement the United States has established directly with another nuclear weapons state. Our agreements with Great Britain and France are indirect agreements via Euratom.

The People's Republic of China's leaders have repeatedly stated they do not favor nuclear proliferation, nor engage in such proliferation by helping other countries to develop nuclear weapons.

It may be, as critics contend, that China's devotion to nonproliferation goals is quite recent and the direct result of this agreement. If that is so, that fact should only reinforce the vital necessity of accepting this agreement, for only through bilateral cooperation can we hope to guide the Chinese nuclear growth in the direction of a more peaceful and secure world.

Let me remind my colleagues once again that a rejection of this agreement by Congress will have little effect on China's ability to export nuclear technology or to use it to upgrade its submarines.

China already has the reprocessing and enrichment technology that would create the greatest proliferation dangers if exported without safeguards. China can import from other nuclear suppliers the expertise that could be useful in improving their nuclear submarines.

If this were to happen, we would be able to do nothing but wring our hands and protest loudly. We will have lost all opportunity to prevent such actions.

It is clear to me that the significant political and security gains the United States will achieve by endorsing this historic agreement far outweigh any of the publicized potential risks.

There are obvious economic benefits that can be gained with the acceptance of this agreement. United States trade with China represents a potential market of $6 billion for the United States industry. Unless our nuclear industry pursues foreign markets, it will be further crippled. On questions of foreign trade, I am constantly told that we should not worry about the loss of old, basic industries. After all, we are told, we can win with high tech.

Well, here is a high tech industry in which we have had a near monopoly, but we act as though we must destroy it, too.

Additional benefits to the United States include energy markets totally unrelated to the nuclear industry, as well as expanded trade opportunities and improved United States-China relations.

Already, this Nation trails far behind the rest of the world in peaceful nuclear dialog with China. If we persist in our self-righteous determination to dot each "i" and cross each "t" in the United States-China accord, we will lose much more than we gain. We must recognize and accept what some may feel is a harsh reality: China's energy demands give us an opportunity to enhance the world's overall security. Our participation in China's energy development will be pivotal in insuring world peace.

Mr. Chairman, let me just add, based upon the comments Senator Cohen made a moment ago about our contacts with the officials of the People's Republic of China when we were there, that indeed the matter was discussed. I told them that I was in favor of this agreement and that I hoped we would ratify it, or at least not object to it. At the same time, I cautioned them, as did Senator Cohen in very forceful terms, that there were very grave arguments and doubts here because of the failure to make specific in the letter of the agreement some of the conditions that we have insisted upon which are covered by their verbal assurances rather than a written agreement.

I also suggested to them they would greatly enhance their standing here and the likelihood of our acceptance of this relationship if they were to join in the ratification of the Nonproliferation Treaty, to which they responded with the standard, boiler plate language, with which we are all familiar.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator McClure, for your testimony and for your insight from your recent visit with officials in the People's Republic of China.

One of the questions raised by critics of the agreement is that essentially it is a one-sided situation in which our side has recorded our impressions and the other side, the People's Republic of China, apparently has not written out anything, or signed or initialed anything.

Do you have any thoughts on this issue?

Senator MCCLURE. Yes. Indeed I do, Mr. Chairman.

I would be more comfortable if indeed the agreements specified every matter that we have discussed and met on the face of the agreement with specific language every concern that has been raised.

But, Mr. Chairman, I think you know that actions speak louder than words. You can have a perfect agreement and imperfect compliance and be much worse off than if you have an imperfect agreement and perfect compliance.

If you look at their deeds and their actions, those speak louder than words, because it is not just the assurances they have given us, it is actions which they have taken that tell us which direction they are headed.

I submit that it is because of our negotiations, because of their desire and ours to have a cooperative agreement that they have taken some of those actions.

I think the dialog is producing the favorable result.

The CHAIRMAN. As a part of your committee chairmanship, you are faced constantly with questions of nuclear energy and nuclear safety. One of the points that you have raised in your testimony is that in the event the United States wishes to have either leverage or cooperation with the People's Republic of China, the type of dialog that has been initiated, and potential peaceful nuclear sales might provide a useful instrument. You also have raised the point that the Chinese have had discussions with other countries, and in the event that we did not wish to have discussions with them, they would continue their nuclear relationship with other potential supplies of equipment.

What is your general judgment of how large a nuclear market the People's Republic of China is? When we put our hats on in other hearings, we are deeply worried about the balance of payments, trade, and jobs, and that has yet to intrude into this discussion. We have come here much more worried about nuclear energy, safety, and proliferation.

Senator MCCLURE. Mr. Chairman, I would not want to overstate that because I think that the opportunities for commercial trade with the People's Republic are limited by their demands. I think we sometimes get too starry-eyed about the potential of a billion-consumer market.

But the other side of that is this. It is obvious that their economic development is, in part, constrained by the availability of adequate supplies of energy. They highlighted this in their own analyses of their own growth plans. It is obvious that those analyses are correct, that they must have additional energy availability in their own country to support the economic evolution and growth in their country.

So I am convinced that that portion of their economic plan is going to be met, or at least they are going to try very hard to meet it, and their plan includes the construction of nuclear powerplants. I think they will be built because it makes sense, just from an objective analysis of what their needs in their society are going to be, as they seek to build their society and the economic base of their country.

The question then becomes who is going to build them. I think that the potential for the economic trade in this area is much more soundly predictable, based upon a more sound analysis of the fact and many other factors that may be involved in future trade.

I think it is, by itself, not a reason for us to accept the agreement. But it is certainly an added reason for us to give serious consideration to the benefits of such an agreement.

The CHAIRMAN. Thank you very much for coming to our hearing this afternoon.

Senator McCLURE. Thank you very much, Mr. Chairman.

The CHAIRMAN. The Chair would like to call now Hon. John Herrington, the Secretary of Energy, to the witness table.

Secretary Herrington, it is a distinct pleasure and honor to have you here in your debut before our committee. We appreciate the service that you have given to our country and we are grateful for your willingness to be a part of this discussion today.

If you would proceed with your testimony, we would appreciate it.

STATEMENT OF HON. JOHN S. HERRINGTON, SECRETARY, DEPARTMENT OF ENERGY

Secretary HERRINGTON. Thank you, Mr. Chairman. It is an honor for me to be here. This is a very distinguished committee. I find myself in a lot of agreement with Senator McClure. We have discussed this issue a number of times. I would like to expand on a couple of remarks that he made.

My formal testimony has been submitted for the record, and with your permission, I ask that it be included.

The CHAIRMAN. It will be made a part of the record in full. Perhaps you would wish to summarize.

Secretary HERRINGTON. Thank you.

First, during his visit to the United States, the Chinese Vice Premier, Li Peng, invited me to visit the People's Republic of China. I have accepted this invitation for next spring. Arrangements are now being made for the visit to occur.

I think this trip might enable us to underscore to the Chinese the benefits of cooperation with the United States firms in the energy sector, including peaceful uses of nuclear energy.

While he was here in this country, I had the occasion to lead him on a guided tour of the Braedwood Nuclear Power Plant in the Chicago area, which is one of the newest and best in our inventory, by Commonwealth, up there. I think his remarks during that tour are very germane to what we are talking about today.

As the chairman knows, Li Peng is 53 years old. He is an electrical engineer and he was educated in Moscow. This was his first trip to the United States.

I think during the time he was here, our meetings during the tour, our helicopters broke down, so we drove all the way out and all the way back in the rain, but we had a chance to talk for over 4 hours about many of the things that you are discussing here in this committee. I think some of his remarks and some of his approaches to that are germane.

To summarize briefly, he spent a lot of time looking and taking notes in the plant. His first reaction was, "we cannot afford this plant; it is too good; it is too overbuilt; it is too gold-plated."

As you know, this country has worked very hard to build what I would say is the Cadillac of nuclear powerplants.

One of the points that I think we might miss in talking about this treaty is that the agreement we have signed does not automatically give U.S. industry the opportunity to participate in this market. What it does is put us in uniform and get us on the playing field. Whether we can then work out the other details of building the best reactor and how it is going to be paid for and other things are way down the line.

Second, following this trip, the Department of Energy has moved expeditiously to approve a number of requests under 10 CFR part 810, to give the nontechnical information to the People's Republic. These authorizations, while they have been relatively minor in scope, will allow our industry to compete on a more equal footing with nuclear vendors from other industries, specifically the French and the Germans.

Although these part 810 authorizations do not include the transfer of special nuclear materials, facilities, or major equipment that require a consummated agreement for cooperation, they will establish a pattern of cooperation between China and the United States that will lay the groundwork for much increased trade in the future.

I am pleased to inform you that 19 of the 27 applications have now been approved.

Third, and what I think is a very important development—it has already been mentioned once here this afternoon—2 weeks ago, during the IAEA general conference in Vienna, the People's Republic of China made a voluntary offer to the IAEA to permit inspection of some of its civil nuclear facilities in the People's Republic of China. Thus, China has joined the United States, France, the U.S.S.R., and the United Kingdom in a very concrete demonstration of their dedication to nonproliferation. This is a big point.

In my prepared testimony, I have given more details on this very significant offer by the People's Republic of China.

Mr. Chairman, the People's Republic of China is not only one of the world's great powers, it is also one of the three largest producers and consumers of energy in the world. The energy decisions made by China have a major effect on the entire energy situation and they are of great importance to the United States.

It is our opinion that favorable congressional review of this Agreement for Cooperation with China will be of great and positive benefit to the international and national interests of the United States.

Increased cooperation with the People's Republic of China will first offer significant opportunities for United States industry to participate, which will definitely be a multibillion-dollar market.

You asked Senator McClure about the potential of that market. It has been estimated at anywhere between $5 and $6 billion. In my conversations with Vice Premier Li Peng, the projections are for between 10 and 12 reactors in their long-term plan.

The benefits in terms of new jobs for our citizens and the beneficial effect for our foreign trade balances are very clear in that light.

In a world where conventional energy supplies are inherently limited, the ambitious economic growth planned by China could place a large burden on those supplies. China's development of indigeneous energy resources will not only stimulate domestic economic development, but it can also help reduce the pressures on world energy supplies.

It is my opinion that this Agreement for Cooperation is a major step forward in promoting a stronger international nuclear nonproliferation regime.

The People's Republic of China has clearly indicated that it shares our concerns about any nuclear weapons proliferation and our joint undertakings under this agreement will afford a continuing opportunity for discussions and consultations on this vital subject.

Department of Energy officials are expected to play a major role in the development and carrying out of this program. Even today, since the visit of the Vice Premier, we have received many technical people from the People's Republic of China who have inquired into regulatory activities, financing, and various ways that they can join the world community in a peaceful cooperation.

The view of the administration is that this agreement is important to the United States. It contributes in a large and important degree to continued strength, stability, and security of our energy system. It has great potential for increased trade, and it will contribute to further strengthening of the international nuclear nonproliferation regime.

I would like to make one more point.

There is involved in this peaceful nuclear cooperation the distinct opportunity for spillover into other, nonnuclear energy projects, and I mean specifically in developing the infrastructure in China, the grid system. There is a huge potential for hydropower in this area. Some of the same contractors involved in nuclear power construction would also be involved in bidding, both on a technical basis and actually on a construction basis for these other projects.

I think we need to get into this game, and I think we need to get our industry competitive in this game.

Thank you, Mr. Chairman.

I would be pleased to try to answer any questions that you have.

[Secretary Herrington's prepared statement follows:]

PREPARED STATEMENT OF JOHN S. HERRINGTON

Mr. Chairman:

The Agreement for Cooperation with the People's Republic of China that I had the privilege to sign on behalf of the United States constitutes a major step in our energy cooperation with China and opens the door to significant benefits to both countries. It is therefore a pleasure for me to have the opportunity to appear before you to discuss the Agreement and to tell you why we in the Administration support it and urge your favorable consideration.

Cooperation with China in the peaceful uses of nuclear energy holds the promise of major advantages in (1) increasing United States energy security, (2) improving the U.S. international trade position, and (3) encouraging the continued development of a stronger Chinese nonproliferation policy that will assist in strengthening the world nonproliferation regime.

In my statement today I intend to address each of these aspects of the Agreement. Before doing this, however, I would like to mention developments that have occurred since I signed the Agreement on July 23 of this year. First, during his visit to the United States, Chinese Vice Premier Li Peng invited me to visit the People's Republic of China. I have accepted this invitation and arrangements are now being made for the visit to occur in the first half of 1986. We envision that this trip can again enable us to underscore to the Chinese the benefits of cooperation with U.S. firms in the energy sector -- including peaceful uses of nuclear energy.

Second, following submittal of the Agreement to Congress, the Department of Energy began moving forward to approve a number of requests under 10 CFR Part 810 which will allow United States companies to participate in China's peaceful nuclear power program. These authorizations, while relatively minor in scope, will allow our nuclear industry to begin to compete on a more equal footing with nuclear vendors from other nations. Although these Part 810 authorizations cannot include the transfer of special nuclear materials, facilities or major equipment, they will establish a pattern of cooperation between China and the U.S. that will lay the groundwork for much increased trade in the future. I am pleased that 19 of these requests have now been approved.

This pattern of cooperation has already been evidenced in other ways. After discussions with the U.S. private sector, representatives of the PRC recently visited the Department of Energy to observe and obtain general, and non-technical, information as to how various administrative, regulatory and procedural activities in the energy area are handled by the United States. They were particularly interested in how we managed large energy construction projects. We were pleased to help these visitors and intend to continue responding to such requests.

A third, and most important development, occurred during the 1985 General Conference of the International Atomic Energy Agency (IAEA) that concluded September 27. At that time, the People's Republic of China announced that it was following the examples set by the United States, France, the U.S.S.R and the United Kingdom in offering to open some of their civil nuclear facilities to IAEA safeguards. When viewed in light of the PRC's earlier decision to require IAEA safeguards on nuclear exports to non-nuclear weapon states, this offer is important additional evidence of the PRC's concern with proliferation issues and their determination to assist in strengthening the international nonproliferation regime.

Mr. Chairman, let me turn now to the importance of this Agreement to our overall energy cooperation with China, and its connection with U.S. energy security. The People's Republic of China is the world's third largest energy producer; only the United States and the Soviet Union produce more. China intends to double its already impressive energy output by the end of this century and views this program as critical to its rapid economic growth. Currently, China's energy program envisages substantial increases in production of oil, coal and hydroelectric power -- as well as nuclear power. The Chinese effort has been initiated to support an ambitious target of quadrupling gross national product over this timeframe.

Currently China's total energy production has reached about 10 million barrels per day oil equivalent. Its greatest energy resource is coal, which provided 70 percent of its total energy output. Proven coal reserves are estimated by China to be about 700 billion tons. In 1984 China produced 772 million metric tons of coal, a nine percent increase since 1983 and they plan to increase their output to 1.2 billion tons by the year 2000. Recently Occidental Petroleum Corporation entered into a $175 million equity sharing agreement to develop the Pingshuo coal mines. Unfortunately, the sources of China's coal reserves are located in areas distant from their industrial areas and China's present transportation networks do not permit full utilization of this important resource.

Oil production is about 2.3 million barrels per day (representing 19 percent of total energy output). China has targeted production to increase to 4 million barrels per day by the year 2000. Crude exports now are about 400 thousand barrels per day, and the PRC hopes to at least maintain this level. The Chinese estimate their potential oil reserves, including undiscovered reserves, at 30-60 billion tons (220-440 billion barrels) and proven reserves at 2-3 billion tons (15-22 billion bbl). Moreover, China has expressed an intention to export a significant proportion of its oil production in order to improve its foreign exchange posture.

Efforts have been made to explore and develop China's offshore areas. About 12 U.S. companies are involved in this undertaking, which amounts to a short-term investment of $600 to $800 million. To date the offshore finds have been disappointing, but onshore petroleum prospects appear more promising than originally expected. In 1984 some 5 billion barrels of new onshore oil deposits were found. Attempts are being made to engage foreign companies to explore and develop this area.

Natural gas represents only about 2 percent of China's total energy output. Even though ARCO had a significant offshore gas strike, it does not appear that natural gas production will increase significantly.

China has the largest untapped hydroelectric potential in the world, with capacity estimated at 680 million kilowatts. The Chinese are anxious to increase their hydropower generation, particularly the development of small hydropower stations in rural areas. Hydropower provides four percent of total energy, accounting for about one third of electric generating capacity.

Like the United States, China views the use of nuclear energy as important to its energy security. The present Chinese nuclear energy program envisages: (1) A 300 MWe plant of Chinese design to be built in Zhejiang province; (2) two 900 MWe reactors to be built using foreign technology in Guangdong and (3) planning for a 1800 MWe facility near Shanghai. These projects are then to be the foundation for the Chinese hope of having 10,000 MWe of installed capacity by the year 2000.

For the United States, a successful Chinese nuclear electricity program can help to reduce future pressures on the world energy market and, thereby, increase both China's and our energy security. We anticipate that development of strong nuclear programs in China and elsewhere can make a real contribution to lower oil prices in the United States and in other consuming nations as well.

As two of the world's largest energy producers and consumers, the United States and China share many of the same energy goals, including the goals of strength, stability and security of supply. Both countries will therefore benefit through cooperation and trade in non-sensitive nuclear commerce.

Turning now to the international trade benefits of this Agreement, the Chinese nuclear program could involve many billions of dollars of procurement. While not all of this figure can be expected to be expended outside China, we are optimistic that United States technology and expertise can be selected for a significant portion of the Chinese program. We know from our discussion with President Li and his delegation that China has a very favorable view of U.S. nuclear power technology. The agreement that is before you for review will permit U.S. companies to compete vigorously in this major new market.

I know that you will recognize the difficulty in estimating such figures, but some conservative private sector studies indicate that in the Chinese nuclear market as it is now planned by their government, the United States could anticipate trade benefits of from $3 billion to $7 billion, and about 160,000 person/years of employment.

In this connection, I wish to emphasize that the United States is only one of several major competitors in the Chinese nuclear energy market. Several western nations have already completed negotiation of their bilateral nuclear agreements with China. Their firms have already begun negotiations and are well-placed to complete supply contracts soon. These firms are aggressively pursuing these negotiations. It is incumbent upon us to establish, with this agreement, the framework necessary to allow the United States companies to compete fairly, to help revitalize the nuclear industry in this country and introduce into China U.S. nuclear standards as soon as possible.

But the advantages from this agreement in the international trade sphere are not limited to nuclear energy. Many of the firms that will be involved in nuclear sales also will be seeking cooperation with China in other energy technologies. In addition to large-item nuclear reactor sales, the agreement could help to establish the necessary business relationships that would encourage Chinese decisions to seek the help of the United States in other energy-related programs. Thus, we believe that approval of this nuclear agreement could also help to increase U.S. participation in the $10-15 billion Chinese hydroelectric market and to open the door to future activities in the development of China's large coal and offshore oil production markets. As this Committee is well aware, this trade is sorely needed by the U.S. economy.

Another aspect of the general issue of U.S.-China cooperation that relates to increased trade is the Chinese interest in learning more of the business practices of U.S. private enterprise. Even though their economic systems are centrally planned and publicly owned, China's leaders recognize that they need to address the same problems that are faced by U.S. concerns in areas such as production and personnel management, financial control and marketing. The Chinese turned to the U.S. to set up its first managerial development center, the National Center at the Dahlian Institute of Technology, that was launced in 1980 with assistance of the U.S. More recently, several Chinese officials visited the Department of Energy to ask for assistance in learning about how to manage large energy projects.

Mr. Chairman, let me now turn to the critical question of nonproliferation, and give you my views as to why approval of this agreement constitutes a major step forward in strengthening this important national security goal.

Just a few short years ago, we in the United States were seriously concerned about China's attitude toward nuclear nonproliferation. As with her rapidly expanding energy security program, however, China's nuclear nonproliferation policy has moved a long way. We are convinced that there is no significant proliferation risk in the agreement which is now before you and that it will, in fact, provide important benefits in decreasing such risk. I wish to indicate some important reasons behind our thinking.

First, and most important, is China's clear commitment to the principles of worldwide nonproliferation. The negotiations that led to this agreement, as well as other Chinese actions such as its decision to join the International Atomic Energy Agency, are evidence of this new approach. As I mentioned earlier, their recent decision voluntarily to allow IAEA safeguards to be placed on some of their civil nuclear facilities is a strong indication of their concern with nuclear proliferation. China had earlier determined that they would require IAEA safeguards on their own nuclear exports.

Second, the agreement does not call for any cooperation which is considered to be sensitive from the standpoint of nuclear proliferation. In particular, let me emphasize that cooperation in the sensitive areas of the nuclear fuel cycle -- including reprocessing technology -- is not permitted under the agreement.

Third, this agreement meets all of the requirements set out in the Nuclear Nonproliferation Act. In light of some questions which have been raised on this point, let me be more specific:

- -- only low enriched uranium can be transferred for use as fuel in the Chinese nuclear electric generating program;
- -- the agreement precludes any military or explosive use of items transferred under it;
- -- no material or items transferred to China may be re-exported without prior U.S. consent;
- -- prior mutual agreement is required before China can reprocess, enrich, or otherwise alter any material subject to this agreement; and
- -- full physical security measures must be applied.

Finally, Mr. Chairman, the agreement calls for the two sides to establish a mutually acceptable arrangement for exchange of information and visits with respect to material, facilities and components subject to the agreement. China, as a nuclear weapon state, like the United States, is not required to accept IAEA safeguards on its nuclear program. China has, however, accepted the need for a mutual system to ensure that the provisions of the agreement are fully implemented. The agreement also calls for exchanges of views and information on each country's national accounting and control systems for nuclear material. Department of Energy personnel will be utilizing their extensive experience in the relevant technical and other areas, and will have a major role in these exchanges and we believe that they can make a major contribution to enhancing mutual confidence and cooperation under the agreement.

Before closing, Mr. Chairman, allow me to revert to the theme of security. I believe that the enhanced opportunities which approval of this agreement will bring in the fields of energy cooperation and trade are directly relevant to our own energy security as well as to that of China. Strong and prosperous energy ties between our nations will strengthen each country's economy. Each of us can benefit, and these benefits will enhance our mutual goal of a strong nuclear nonproliferation regime. We have seen China take significant forward steps in anticipation of cooperation with us in the nuclear energy area. I believe that when we go forward with this cooperation we will consolidate and strengthen China's commitment to this important -- even critical -- national security goal.

Thank you for the opportunity to present my views today. I will be pleased to address any questions you might have.

The **Chairman**. Secretary Herrington, your statement and your oral testimony are strong endorsements for proceeding with the agreement.

Do you have any reservations about the agreement, any questions that you would bring to the attention of the committee for further examination?

Secretary **Herrington**. I don't have any questions about the agreement itself. I was the person who signed the agreement for the United States. I did read it. It complies with U.S. law in the opinions of lawyers at Energy, State, and Defense. I think that is the important thing.

What begins now, if we go forward from this point—and I am urging strongly, obviously, that we do—what begins now is probably a 10-year process. I say 10 years because I have had conversations with Monsieur Reynon from the French Atomic Energy Commission who has detailed to me the 6 and 7 years of negotiations that they had with the People's Republic of China, not being hampered by the need for an agreement such as this. Negotiations are difficult; they are long; they are detailed. And during that time, we have a chance to look at this process.

During construction we have a chance, too, to look at this process. Under article 7, if we, at any time, become concerned that things are not right on a nonproliferation basis or that there is a bad faith effort on behalf of our partner, we have the opportunity to walk away from this agreement. I think we can do that very easily.

I think this agreement eliminates a stumbling block that we need to get behind us and we need to get into the commercial system between America and China.

As for the agreement itself, I have no questions.

The **Chairman**. You mentioned the visit of the Vice Premier, Li Peng, and your own opportunity to visit with him at some length during that trip. In the course of your conversation, without violating any confidences, did you discuss the agreement? I remember visiting with Li Peng personally at a breakfast, and this agreement was much on his mind, even in our very abbreviated conversation.

What thoughts did he have about the situation?

Secretary **Herrington**. Sir, I know that you did have a great deal of time to talk to the Vice Premier, and I think he stressed to me the willingness of their country to move forward in a spirit of nonproliferation and the spirit of these conversations that he had had with you, the President, and the Secretary of State. There is little doubt in my mind that they intend to be very careful as they proceed under this agreement to meet the concerns of nonproliferation.

Because of his age and his contemporaries' ages—they are young, they are moving up in the Government—I think they want to come into the technological base of the Western World. I think they are quite serious about it.

He, as an engineer, was the most bottomline foreign official that I had talked to. He was interested in cost, regulation, how you get around the construction problems and certain things. He is moving up in the Government, along with some of his contemporaries. I think it offers us a real opportunity to establish some groundwork here and to work with them to move forward from this point.

I thought, in my personal evaluation, that he was extremely serious about the concerns that are being raised. Of course, I raised our concerns, as I am sure you did and everyone else, of how important it was that we watch carefully that this does not become a problem.

The **Chairman**. I agree with you. The age of Mr. Li Peng and the potential longevity of that relationship could be very important in our relationships with his country.

Let me ask you this. In your opinion, is China taking other economic organizational decisions needed to pursue its ambitious energy modernization program? Do you have any idea of the People's Republic of China's overall needs?

Secretary **Herrington**. Yes. We discussed this at length.

I have no personal ability to evaluate the feasibility of their plans. But I think they are definitely headed toward a strong attempt to increase their GNP by a factor of four between now and the year 2000. I think he is quite serious about doubling the energy capacity in that country by the year 2000.

As we sit here today, their total energy consumption in China is about 10 million barrels a day, if you took a barrel of oil equivalence. If you double that, you are going to 20 million barrels a day. It is going to take a lot of work.

He did make a couple of remarks that I think were quite illuminating for this discussion. For one, he said "This plant is very expensive, I don't know how we are going to pay for it. We would like to take it out in trade." But, he said, "This is my first visit to America and frankly, I, don't see anything you need." I thought this was very straightforward.

He did allude several times to international cooperation and joint venturing in some of these projects.

If we go past this barrier, there is a great deal more to be talked about and how this would happen and how we would fit into it.

So, basically, I think their intentions are to move out. How and when they are going to get there I cannot predict.

The **Chairman**. Secretary Herrington, we thank you very much for coming today and for your testimony.

Secretary **Herrington**. Mr. Chairman, it has been an honor. Thank you.

The **Chairman**. The Chair would like to call now a panel composed of Ambassador Kennedy, Assistant Secretary Wolfowitz, Dr. Albright, and Mr. Michael Matheson.

Gentlemen, we thank you for making yourselves available for this hearing which is designed to make certain that we hear all relevant viewpoints.

I want to express our appreciation to you again, Ambassador Kennedy, for your willingness to do double duty. You testified ably yesterday in our closed session and are willing to reappear today in this open session. We are grateful to you.

Let me ask you, Ambassador Kennedy, with regard to the group, how the testimony of this panel might be organized so that your time is efficiently used. Are members of the panel prepared to summarize testimony with the assurance that their full statements will be made a part of the record, and then to proceed to questions? Would that be an agreeable way of proceeding?

Ambassador Kennedy. Mr. CHAIRMAN, may I comment on behalf of my colleagues from the Department of State. I have truncated my testimony by removing from it all those matters which my colleague from the Legal Department will be covering, and I know that Secretary Wolfowitz will be covering the broader aspects of our China-United States relationship, which I think will fill in the full spectrum.

So I think by way of doing that, from the State Department's point of view, we will accommodate you, and I am sure Mr. Albright can also comment.

The CHAIRMAN. Very well.

Let me ask then that you testify in this order: First of all, Ambassador Kennedy; then Secretary Wolfowitz; Dr. Albright, and then Mr. Matheson. If possible, try to confine your oral testimonies to a 5- to 10-minute period, if that is reasonable, and then we will proceed to questions.

Ambassador Kennedy.

STATEMENT OF HON. RICHARD T. KENNEDY, AMBASSADOR-AT-LARGE AND SPECIAL ADVISER TO THE SECRETARY OF STATE ON NONPROLIFERATION POLICY AND NUCLEAR ENERGY AFFAIRS

Ambassador KENNEDY. Thank you, Mr. Chairman. I appreciate your kind remarks. Actually for me it is a pleasure as well as a privilege to come up and join with the committee in attempting to be sure that we have a clear picture of what we are trying to do.

The CHAIRMAN. Would you bring your microphone a bit closer? That might enable the audienced to better hear you.

Ambassador KENNEDY. Certainly. Does that help?

The CHAIRMAN. Yes, it does. Bring it as close as you can. The room is crowded today, and if we can have more volume, that would help.

Ambassador KENNEDY. Certainly.

It is our purpose, Mr. Chairman, as you know, to try to be sure that the committee understands what we are about here, to take the kind of informed decision which we know it wishes to pursue.

Therefore, we are most pleased to be here to discuss the proposed agreement.

The agreement, as you know, was signed on July 23, during the Chinese President's visit to Washington. We believe this agreement is important to the interest of both countries and supportive of our long-shared nonproliferation objectives.

The agreement establishes the basis of cooperation between the United States and China in a variety of peaceful applications of nuclear energy. It provides the basis for the export of nuclear reactors, fuel, components, and the exchange of technology, including cooperation in health, safety, and the environmental implications of the peaceful uses of nuclear energy.

It is not, however—and I would emphasize this—the agreement is not a commitment to supply. Rather, it provides the legal framework within which nuclear cooperation may take place.

Once the agreement enters into force, nuclear reactors, components, and nuclear fuel may be exported, subject to the agreement under licenses to be issued by the Nuclear Regulatory Commission in accordance with existing law and practice.

The nuclear cooperation between the United States and China which will be permitted by the agreement is confined exclusively to the peaceful uses of nuclear energy. The agreement contains reciprocal commitments by the United States and China that nuclear facilities and materials subject to the agreement will not be used for any nuclear explosive or military purpose. This guarantee, as well as other assurances and controls in the agreement, will help preserve the distinction between the civil and military uses of nuclear energy.

It is also important to stress that cooperation under the agreement is limited to nonsensitive aspects of the nuclear fuel cycle. It expressly excludes the transfer of any sensitive nuclear technology such as enrichment or reprocessing. Nor does the agreement in any way permit technology of strategic or military significance to be transferred.

The text of the agreement and supporting documents developed during its review within the executive branch have been transmitted to the Congress by the President. The text in most respects does not differ significantly from new and renegotiated agreements for peaceful nuclear cooperation which we have concluded with other countries since enactment of the Nuclear Nonproliferation Act of 1978, agreements which have been before Congress for review.

The agreement with China fully meets all the requirements specified in section 123 of the Atomic Energy Act of 1954, as amended, for nuclear cooperation agreements with nuclear weapons states.

The statement of the State Department Deputy Legal Advisor, on my right, will address in detail the requirements specified in section 123 of the Atomic Energy Act of 1954, as amended, for nuclear cooperation agreements with nuclear weapons states and allude then to specific provisions of the agreement which meet each of these requirements.

I would emphasize, though, that all of the guarantees are reciprocal in nature, and would apply to Chinese exports to the United States as well. They are, in substance, identical to those in all our other post-1978 agreements.

Unlike the other agreements concluded since 1978, however, this one is with a single nuclear weapons state, as such states are defined in the treaty on the Nonproliferation of Nuclear Weapons, or the NPT. This agreement does not provide for International Atomic Energy Agency safeguards in the People's Republic of China on nuclear material equipment or facilities subject to the agreement since such safeguards are not required for nuclear weapon states either by the Atomic Energy Act or the Nonproliferation Treaty.

But neither does the agreement foreclose such safeguards under any voluntary offer which China may undertake with the IAEA in the manner of other nuclear weapon states. I would note here that at the General Conference of the International Atomic Energy

Agency in Vienna just 2 weeks ago, China officially announced its decision to make such a voluntary offer to the IAEA.

The agreement does contain provisions for consultations, exchanges of information, and visits to the sites of materials, facilities, and components which are subject to the agreement. The agreement also provides for exchanges of views and information on each country's national accounting and control systems and consultations on physical protection measures. The purpose of all these exchanges of visits and information is to insure that the provisions of the agreement are effectively and openly carried out, including the provision that cooperation will be exclusively for peaceful purposes.

There are very substantial benefits to be derived from this agreement, Mr. Chairman. It will lay the groundwork for strengthening economic ties between the United States and China and create new opportunities for United States companies to participate in China's expanding energy sector. China has begun the development of a major nuclear power program to meet its growing energy needs. The Chinese view nuclear energy as playing a key role in China's industrial development and modernization program.

United States firms are already involved in other energy projects, as Secretary Herrington has noted, to develop coal, oil, and other energy resources in China. We believe that participating in a diversified and well balanced energy program in China is supportive of United States interests and not just Chinese.

A most important benefit of peaceful nuclear cooperation between the United States and China is the opportunity that it provides for both countries to work together to prevent the spread of nuclear explosives. President Reagan has declared that the nonproliferation of nuclear weapons is a fundamental national security and foreign policy objective of the United States. This consideration was at the top of our agenda during our talks with the People's Republic of China and will remain the paramount concern of the United States.

Clearly, cooperation in the peaceful uses of nuclear energy must rest on a foundation of shared views and principles on the necessity of deterring the threat of nuclear proliferation.

Since the negotiations began on the agreement, China made significant new statements on its nonproliferation policy, showing that it is opposed to the spread of nuclear explosives to additional countries.

On January 10, 1984, at the White House, Premier Zhao stated, and I quote, "China does not advocate nor encourage proliferation." He went on to say, "We do not engage in proliferation ourselves nor do we help other countries develop nuclear weapons."

Premier Zhao reiterated this statement in February in Beijing and at the Sixth People's Congress in May as well.

The Premier's speech to the National People's Congress is the closest equivalent in China to a Presidential "State of the Union" address.

The statement was endorsed by the National People's Congress and published as official policy of the Government of China.

In January 1985, the official Chinese press published a statement by Vice Premier Li Peng that China has no present or future intention to help nonnuclear weapon states develop nuclear weapons and that China's present or future cooperation with other countries is confined to peaceful purposes.

The Chinese made clear to us that when they say they will not assist other countries to develop nuclear weapons, this also applies to all nuclear explosives. This is a basic Chinese policy. We believe it will guide China's nuclear cooperation in the future.

China has also taken important steps to participate in the international nonproliferation efforts. It joined the International Atomic Energy Agency, as Secretary Herrington noted, in January 1984, and has stated that it requires the application of IAEA safeguards to nuclear exports to nonnuclear weapon states. In adopting this policy, China is acting in accordance with existing international norms for nuclear trade.

As China undertakes nuclear cooperation with other countries and moves into international nuclear affairs, it is vital that we have a bilateral forum which allows us to work closely with China to maintain and strengthen the international nonproliferation regime. This agreement in itself establishes a mechanism for consultations enabling regular exchanges of views and information on means to prevent the spread of nuclear weapons.

Our contacts with the Chinese have already demonstrated that they appreciate the importance we attach to nonproliferation. We are satisfied that the policies they have adopted are consistent with our own basic views. Formalizing our ties in the peaceful uses of nuclear energy through an agreement for cooperation will provide a means to advance our shared objectives.

We believe the agreement, therefore, serves the national security and nonproliferation interests of the United States and believe that it deserves full support.

Mr. Chairman, before closing, may I comment only very briefly on a note which Senator Cohen made earlier. He referred to the statements, et cetera, which China has made, the discussions which we had with China concerning their policies, to be what the State Department thinks. Those were the words that I think he used.

Let me just say that with all due respect, the statements to which I think the Senator was referring were those which were included in a memo, in a note which we ourselves prepared, to summarize the conversations which we had with the Chinese.

The Chinese, as we have noted, were aware of the contents of that note.

The note was prepared as the result of conversations which we had in China over a period of several days. Those conversations were participated in by not only the Department of State but as well ACDA and the Department of Energy. All interested parties who were concerned both with the nonproliferation aspects and the technical aspects of the agreement were present. Those were not just the views of the Department of State, but rather the views of the executive branch of the Government, supported by the President, who forwarded them to the committee.

Thank you, Mr. Chairman.

[Ambassador Kennedy's prepared statement follows:]

PREPARED STATEMENT OF RICHARD T. KENNEDY

Mr. Chairman:

I am pleased to appear before this Committee today to discuss the proposed agreement between the United States and the People's Republic of China concerning the peaceful uses of nuclear energy. This agreement was signed on July 23rd during the Chinese President's visit to Washington. We believe this agreement is important to the interests of both countries and supportive of our shared non-proliferation objectives.

The agreement establishes the basis for cooperation between the United States and China in a variety of the peaceful applications of nuclear energy. It provides the basis for export of nuclear reactors, fuel, components and the exchange of technology including cooperation in health, safety and the environmental implications of the peaceful uses of nuclear nergy. The agreement is not, however, a commitment to supply. Rather, it provides the legal framework within which nuclear cooperation may take place. Once the agreement enters into force, nuclear reactors, components and nuclear fuel may be exported subject to the agreement under licenses issued by the Nuclear Regulatory Commission, in accordance with existing law and practices.

The nuclear cooperation between the United States and China permitted by the agreement is confined exclusively to the peaceful uses of nuclear energy. The agreement contains reciprocal commitments by the U.S. and China that nuclear facilities and materials subject to the agreement will not be used for any nuclear explosive or military purpose. This guarantee as well as other assurances and controls in the agreement will help preserve the distinction between the civil and military uses of nuclear energy. It is also important to stress that cooperation under the agreement is limited to non-sensitive aspects of the nuclear fuel cycle. It expressly excludes the transfer of any sensitive nuclear technology such as enrichment or reprocessing. Nor does it in any way permit technology of strategic or military significance to be transferred.

The text of the agreement and supporting documents developed during its review within the Executive Branch have been transmitted to the Congress by the President. The text in most respects does not differ significantly from new and renegotiated agreements for peaceful nuclear cooperation which we have concluded with other countries since enactment of the Nuclear Non-Proliferation Act of 1978, and which have been before Congress for review. The Agreement with China fully meets all the requirements specified in Section (123) of the Atomic Energy Act of 1954, as amended, for nuclear cooperation agreements with nuclear weapons states.

The statement of the State Department Deputy Legal Advisor will address in detail the requirements specified in Section (123) of the Atomic Energy Act of 1954, as amended, for nuclear cooperation agreements with nuclear weapon states and the specific provisions of the agreement which meet each of these requirements.

All of the guarantees are reciprocal in nature and would apply to Chinese exports to the U.S. They are in substance identical to those in all our other post 1978 agreements. Unlike the other agreements concluded since 1978, however, this one is with a single nuclear weapon state, as such states are defined in the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). This agreement does not provide for International Atomic Energy Agency safeguards in the PRC on nuclear material, equipment or facilities subject to the agreement since they are not required for nuclear-weapon states by either the Atomic Energy Act or the NPT. But neither does the agreement foreclose such safeguards under any voluntary offer which China may undertake with the IAEA in the manner of the other nuclear weapon states. I would note here, that at the General Conference of the International Atomic Energy Agency in Vienna two weeks ago, China officially announced its decision to make such a voluntary offer to the IAEA.

The Agreement does contain provisions for consultations, exchanges of information and visits to the sites of materials, facilities and components subject to the agreement. The agreement also provides for exchanges of views and information on each country's national accounting and control systems and consultations on physical protection measures. The purpose of these exchanges of visits and information is to ensure that the provisions of the agreement are effectively and openly carried out, including the provision that cooperation will be for exclusively peaceful purposes.

There are very substantial benefits to be derived from this agreement. The agreement will lay the groundwork for strengthening economic ties between the United States and China and create new opportunities for U.S. companies to participate in China's expanding energy sector. China has begun the development of a major nuclear power program to meet its growing energy needs. The Chinese view nuclear energy as playing a key role in China's industrial development and modernization program. U.S. firms are already involved in other energy projects in China to develop coal, oil and other energy resources, and we believe that participating in a diversified and well balanced energy program in China is supportive of U.S. interests.

A most important benefit of peaceful nuclear cooperation between the United States and China is the opportunity it provides for both countries to work together to prevent the spread of nuclear explosives. President Reagan has declared that the non-proliferation of nuclear weapons is a fundamental national security and foreign policy objective of the United States. This consideration was at the top of our agenda during our talks with the Chinese, and will remain the paramount concern of the United States

Clearly, cooperation in the peaceful uses of nuclear energy must rest on a foundation of shared views and principles on the necessity of deterring the threat of nuclear proliferation. Since negotiations bagan on the proposed agreement, China made significant new statements on its non-prolifertion policy which show that China is opposed to the spread of nuclear explosives to additional countries. On January 10, 1984, at the White House, Premier Zhao stated "China does not advocate nor encourage proliferation. We do not engage in proliferation ourselves, nor do we help other countries develop nuclear weapons." Premier Zhao reiterated this statement in February in Beijing and at the Sixth People's Congress in May. The Premier's speech to the National People's Congress is the closest equivalent in China to a Presidential "State of the Union" address. The statement was endorsed by the National People's Congress, and published as official policy. In January 1985, the official Chinese press published a statement by Vice Premier Li Peng that China has no present or future intention to help non-nuclear weapon states develop nuclear weapons and that China's present or future cooperation with other countries is confined to peaceful purposes. The Chinese have made clear to us that when they say that they will not assist other countries to develop nuclear weapons, this also applies to all nuclear explosives. This is a basic Chinese policy which we believe will guide China's nuclear cooperation in the future.

China has also taken important steps to participate in international non-proliferation efforts. It joined the International Atomic Energy Agency (IAEA) in January 1984 and has stated that it requires the application of IAEA safeguards to nuclear exports to non-nuclear-weapon states. In adopting this policy China is acting in accordance with existing international norms for nuclear trade.

As China undertakes nuclear cooperation with other countries and moves into international nuclear affairs, it is vital that we have a bilateral forum which allows us to work closely with China to maintain and strengthen the international non-proliferation regime. The agreement itself establishes a mechanismm for consultations enabling regular exchanges of views and information on means to prevent the spread of nuclear explosives.

Our contacts with the Chinese have already demonstrated that they appreciate the importance we attach to non-proliferation. We are satisfied that the policies they have adopted are consistent with our own basic views. Formalizing our ties in the peaceful uses of nuclear energy through an agreement for cooperation will provide a means to advance our shared objectives.

We believe the agreement serves the national security and non-proliferation interests of the United States. We believe it deserves the full support of the Congress.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Ambassador Kennedy.

Before I call upon Mr. Wolfowitz, the Chair must recognize that the buzzer, which we all just heard, is a rollcall vote. The Senate is making progress today toward raising the debt ceiling and thus bringing liquidity back to the banks of the country.

So, I will declare a recess, and will soon be back to continue the hearing.

I apologize for this intrusion.

Ambassador KENNEDY. We understand, Mr. Chairman, that it might even help our checks clear the bank. So we thank you.

[A brief recess was taken.]

The CHAIRMAN. The hearing is called to order again.

The Chair now recognizes the Deputy Assistant Secretary of State for East Asian and Pacific Affairs, Mr. Paul Wolfowitz.

STATEMENT OF PAUL WOLFOWITZ, ASSISTANT SECRETARY OF STATE FOR EAST ASIAN AND PACIFIC AFFAIRS

Mr. WOLFOWITZ. Thank you, Mr. Chairman. I appreciate the opportunity to testify, and I take your admonition about brevity seriously. I have tried to be brief with my statement, which I will submit for the record. I will present a somewhat slightly shorter version even of the statement.

This committee's actions on the agreement for cooperation with China will have ramifications for our overall national security interests, for our nonproliferation policy, and our bilateral relationship with the People's Republic of China.

Just as Ambassador Kennedy and his team of negotiators did not enter into this agreement lightly, just as the President did not authorize its approval without careful analysis, neither, I submit, should the Senate or House study this agreement without serious consideration of the following two questions.

First of all, what are the benfits of this agreement for U.S. national security and nonproliferation interests, and do these benefits not outweigh any possible risks?

Second, what will be the result if the agreement is not brought into force? How will U.S. interests be served if that happens.

First, Mr. Chairman, I would like to point out, as others have before me, that during the course of our discussions on the agreement, the Chinese became increasingly involved in the international nonproliferation regime. And they have come to play a much more constructive role.

They have joined the International Atomic Energy Agency. They have announced that they would apply IAEA safeguards to their nuclear exports. They have entered into several bilateral agreements for cooperation.

Recently, they made the very important announcement that they will undertake discussions with the IAEA on an offer of voluntary safeguards on facilities in China, similar, in principle, at least, to those that we, ourselves, and other nuclear powers have made.

The Chinese have also made a number of high-level policy statements, and I would emphasize that these were high-level policy statements and not mere toasts tossed off in haste and casually. These clearly set forth their position that they are opposed to the spread of nuclear weapons and do not assist or encourage others to develop such weapons.

This speaks to my first question. I believe that it has been very much in our national security interests, including our very important interest in promoting nuclear nonproliferation, that we were able to engage the Chinese in concrete and meaningful discussions about their nuclear export policies and practices.

There is no doubt that this dialog had a salutary effect on the evolution of the People's Republic of China nonproliferation policy in directions that, in my view, represent major gains for the goal of nonproliferation.

From the People's Republic of China point of view, they made a number of important concessions to reach the point where we could sign an agreement. They now understand clearly that if they want to engage in nuclear trade with us, they will not only have to observe the terms of this agreement, which conforms, I would emphasize, to the strict requirements of U.S. law; they also fully understand the further implications that the U.S. Atomic Energy Act, as amended, carries for their future cooperation with us and for their own nonproliferation practices.

Does this turn of events not serve U.S. interests? Can further progress be made if we turn our back on the agreement that is now before you?

In my judgment, the answer to that question is no.

This brings me to my second question. After all of this—the painstaking negotiations, the extensive discussions with the Chinese about our requirements, and their own substantial forward movement—there is no question that the Chinese will resent it—and I think I would add they would resent it deeply—if we walk away from this agreement. Renegotiation would be, in effect, walking away from the agreement that is now before you.

A great deal of progress will go up in smoke if the agreement is torpedoed. I think we all have to ask ourselves what will be the consequences for our nonproliferation goals if we walk away from this agreement. How will our interests be served if China proceeds to make use of its own considerable nuclear technology and that which it can obtain from many non-U.S. sources without any influence by us?

Let me underscore, Mr. Chairman, though it may seem quite elementary to say so, that China is quite capable of pursuing nuclear development on its own. This is a central fact that those who ask for an impossible degree of perfection in the agreement too often fail to address.

China has been a nuclear weapons state for 21 years now without any help from us. It is a significant nuclear supplier to third countries, and it will continue to be one, even without this agreement.

To me the question is do we want to enhance our influence over China's nonproliferation policies and in China's nuclear power development or do we want to be bystanders. The answer to me is a clear one.

Finally, Mr. Chairman, I would like to point out that failure to bring this agreement into force will be harmful to the developing relationship that we are building with China. That relationship is a very important one.

China is an important country, one that is, after years of isolation, expanding its contacts with the West in a very constructive way. We look to strengthen our own ties with the People's Republic of China under a framework of agreements and arrangements consistent with our own national interest. Our strengthening relationship with China has positive implications for our own security interests as well as for social and economic developments within China and in Asia more broadly.

Consistent with our other policy goals—which I believe this agreement advances—we want to encourage China's opening to the outside, not slam the door in its face. We want to encourage China's increasingly responsible behavior as a nuclear supplier, not lend support to those in China who might argue that China should follow its own course, taking no account of our concerns.

For all of these reasons, Mr. Chairman, and some others that I have in the longer statement that I will submit for the record, I strongly believe that the agreement before you deserves your support. Thank you.

[Mr. Wolfowitz's prepared statement along with additional material subsequently submitted for the record follows:]

PREPARED STATEMENT OF PAUL WOLFOWITZ

MR. CHAIRMAN:

Before the Committee resumes its questioning, I would like to pose a couple of questions myself. I will offer my own answers, but would ask you to consider them seriously yourselves.

This committee's actions on the agreement for cooperation with China will have ramifications for our overall national security interests, our non-proliferation policy, and our bilateral relationship with the PRC.

Just as Ambassador Kennedy and his team of negotiators did not enter into this agreement lightly, just as the President did not authorize its approval without careful analysis, neither, I submit, should the Senate or House study this agreement without serious consideration of the questions I now pose.

-- First of all: what are the benefits of this agreement for US national security and non-proliferation interests?; and do these benefits not outweigh any possible risks?

-- And secondly: What will be the result if the agreement is not brought into force? How will U.S. interests be served if that happens?

In addressing these questions, first I would like to reiterate something Ambassador Kennedy has said many times. This agreement would not be before the Congress if the Executive Branch did not believe that it meets all relevant requirements of U.S. law. In addition, we spent more than a year after the initialling of the agreement to reach a clear and complete understanding of China's non-proliferation policies and practices. Reaching that clear understanding also was a prerequisite for moving the agreement forward.

I would point out, as others have before me, that during the course of our discussions on the agreement, the Chinese became increasingly involved in the international non-proliferation regime. And they have come to play a much more constructive role. They joined the IAEA, announced they would apply IAEA safeguards to the nuclear exports, and entered into several bilateral agreements for cooperation. Recently, they made the important announcement that they will undertake discussions with the IAEA on a voluntary offer. The Chinese also have made a number of high-level policy statements -- these were not a mere "toast" tossed off in haste -- which clearly set forth their position that they are opposed to the spread of nuclear weapons and do not assist or encourage others to develop such weapons.

Given this background, once we reached the stage where we could move the agreement forward, we felt a great deal had already been accomplished. We now look forward to building on that progress under the terms of a bilateral agreement for cooperation.

This speaks to my first question. I believe it has been very much much in our national security interest, including our very important interest in nuclear non-proliferation, that we were able to engage the Chinese in concrete and meaningful discussions about their nuclear export policies and practices. There is no doubt that this dialogue also had a salutary effect on the evolution of the PRC's non-proliferation policy.

Why was this dialogue possible? Because the the Chinese want this agreement. They want American firms to compete for their nuclear power business. They recognize the advantages of American technology. They want nuclear power to be a part of their energy modernization program. They see American participation as lending credibility to their energy development plans, which are a key to their overall program of economic revitalization.

From the PRC's point of view, they made a number of important concessions to reach the point where we could sign an agreement. They now understand clearly that if they want to engage in nuclear trade with us they will not only have to observe the terms of this agreement, which conforms to the requirements of U.S. law; they also fully understand the further implications which the U.S. Atomic Energy Act, as amended, carries for their future cooperation with us and for their own non-proliferation practices.

Does this turn of events not serve US interests? Can further progress be made if we turn our back on this agreement now before you?

This brings me to my second question. After all of this -- the painstaking negotiations, the extensive discussions with them about our bottom-line requirements, and their own considerable movement in a positive direction -- there is no question that the Chinese will resent it if we walk away from this agreement. And re-negotiation would be, in effect, walking away from the agreement that is now before you. The Chinese are not of a mood to re-draft the agreement after all we have been through. Furthermore, we ourselves believe there is no need for a re-negotiation, as the agreement meets all U.S. legal requirements and will make a valuable contribution to our non-proliferation goals.

A great deal of progress will go up in smoke if the agreement is torpedoed. I think we have to ask ourselves: what will be the consequences for U.S. non-proliferation goals if we walk away from it? How will our interests be served if China proceeded to make use of its own considerable nuclear technology, and that which it can obtain from non-U.S. sources, without influence by us?

China is quite capable of pursuing nuclear development on its own. This is a central fact that I think the critics too often fail to address. China has been a nuclear weapons state for 21 years without any help from us. It is a significant nuclear supplier to third countries, and will continue to be, even without this agreement. Do we want to enhance our influence over China's non-proliferation policies and in their nuclear power development, or do we want to be bystanders? The answer, to me, is clear.

Finally, I must point out that failure to bring this agreement into force will be harmful to the developing relationship that we are in the process of building with China. That relationship is important. China is an important country, one that is, after years of isolationism, expanding its contacts with the West. We look to strengthen our own ties with the PRC under a framework of agreements and arrangments consistent with our national interest. Our strengthening relationship with the PRC has positive implications for our own security interests as well as for social and economic developments within China.

Consistent with our own policy goals -- which we believe this agreement supports -- we want to encourage China's opening to the outside, not slam the door in its face; we want to encourage China's increasingly responsible behavior as a nuclear supplier, not lend encourangement to those who might argue that China should follow its own course, taking no account of our concerns.

For all of these reasons, I believe the agreement before you deserves your support.

United States Department of State

Washington, D.C. 20520

OCT 2

Dear Mr. Chairman:

The agreement for peaceful nuclear cooperation between the U.S. and China was transmitted to Congress by the President on July 24, 1985, and your committee held public hearings on it October 9, 1985. At the hearings, a question was raised about article 2(1). We have prepared the enclosed memorandum addressing this provision, which we hope will allay any concerns on this matter. We also believe it would be useful for the memorandum to be made a part of the hearing record.

Sincerely,

William L. Ball, III
Assistant Secretary
Legislative and Intergovernmental Affairs

Enclosure:

As stated.

The Honorable
Richard G. Lugar,
Chairman, Committee on Foreign Relations,
United States Senate.

Legal Memorandum Prepared by the Department of State on Article 2(1) of the Agreement for Cooperation Between the United States and the People's Republic of China Concerning Peaceful Uses of Nuclear Energy

Article 2(1) of the Agreement between the United States and the People's Republic of China Concerning Peaceful Uses of Nuclear Energy provides:

> The parties shall cooperate in the use of nuclear energy for peaceful purposes in accordance with the provisions in this agreement. Each party shall implement this agreement in accordance with its respective applicable treaties, national laws, regulations and license requirements concerning the use of nuclear energy for peaceful purposes. The parties recognize, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.1/

Questions have been raised as to whether the third sentence in this paragraph qualifies the authority of Congress to enact subsequent legislation affecting the activities covered by the agreement, or in any other way prevents the Congress from legislative action. These concerns are without foundation since, as will be seen below, the sentence sets forth a well-established principle of international law which would apply to the agreement whether or not it was explicitly stated. Moreover, the agreement provides that each Party will implement it in accordance with its laws, regulations, and license requirements. This latter provision, taken in conjunction

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1/ House Doc. 99-86, 99th Cong., 1st Sess. at 6 (July 24, 1985).

with the fact that the agreement does not itself commit the United States to export any nuclear material, facility or component, ensures the availability of the necessary flexibility for the United States in the future. These provisions do not in any way qualify or reduce the ability of Congress to take such actions as it considers appropriate in the future with respect to exports of U.S. items.

The Relationship of U.S. Domestic and International Law

It is clear that a constitutionally valid law enacted subsequent to the entry into force of an international agreement can, as a matter of U.S. law, frustrate the ability of the President to fulfill an international obligation that was lawfully incurred.[2] Further, the Executive Branch must comply with constitutionally valid U.S. statutes, even though they may be inconsistent with previous international agreements.[3]

At the same time, there is no doubt that, under international law, a change in domestic law does not relieve a country of obligations incurred under an international agreement. The most recent statement of the rule may be found in section 135(1)(b) of the latest draft of the American Law Institute's Restatement of Foreign Relations Law (Revised): "That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequence of a violation." The reporters' comment (b) explains: "Subsection (1)(b) makes clear that although subsequent legislation may supersede an earlier rule of international law or provision of an international agreement as domestic law, the United States remains bound by the rule or agreement internationally under the principle stated in section 321. A state cannot adduce even its Constitution as an excuse for failure to carry out its international obligation. Advisory Opinion on Treatment of Polish Nationals in Danzig, P.C.I.J., ser. A/B, No. 44 at 22 (1932)."[4/]

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[2] Head Money Case, 112 U.S. 580 (1884); The Chinese Exclusion Case, 130 U.S. 581, 597, 599 (1899); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871); Diggs v. Shultz, 470 F.2d 461 (D.C. Cir.), cert. denied 411 U.S. 931 (1972).

[3] U.S. Constitution, art. II, sec. 3.

The rule in section 135(1)(b) is consistent with that adopted in 1962 by the American Law Institute in section 140 of

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[4/] American Law Institute, Restatement of Foreign Relations Law of the United States (Revised) 78, 79 (Tent. Final Draft July 15, 1985).

the Restatement of the Foreign Relations Law of the United States.[5]

This rule is a long-standing principle of customary international law, confirmed in state practice, international agreements, and authoritative commentaries.[6] The rule was most recently codified in the 1969 Vienna Convention on the Law of Treaties. Article 27 of Vienna Convention provides:

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[5] "The duty of a state to give effect to the terms of an international agreement to which it is a party, as stated in section 138, is not affected by a provision of its domestic law that is in conflict with the agreement or by the absence of domestic law necessary for it to give effect to the terms of the agreement."

[6] An early expression of this customary international law rule was in Article 10 of the Convention on Treaties done at Havana February 20, 1928. The rule was also contained in article 23 of the draft Convention on the Law of Treaties prepared by the Harvard Research in International Law in the 1930s. The commentary to article 23 includes the following statement of Secretary of State Boyard with reference to the Cutting case: ". . . if a government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law and in either case that law furnishes the test of the nation's liability and not its own municipal rules. This proposition seems now to be so well understood and so generally accepted, that it is not deemed necessary to make citations or to adduce precedents in its support. (U.S. Foreign Relations, 1887, p. 751; 2 Moore, Digest of International Law, 1906, p. 235.)" 29 A.J.I.L. Supp. 1029, 1034 (1935).

> A Party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty. . . . "[7]

This rule of international law is essential to maintaining the integrity and stability of international obligations; if a party to such obligations could derogate from them simply by enacting domestic legislation, those obligations would be illusory and of little importance. The United States, which relies heavily on the performance by other countries of the obligations they have incurred in agreements with the U.S., has a particularly strong interest in the observance of this rule.

Application of the Rule in Peaceful Nuclear Cooperation Agreements

The rule stated in article 2(1) of the agreement with China is generally applicable to U.S. nuclear cooperation agreements, whether it is explicitly stated or not. The rule is essential to U.S. interests in this area, since in the absence of such a rule, a recipient of U.S. materials, equipment or components could relieve itself of its obligations with respect to such items simply by adopting inconsistent domestic

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7/ Senate, Executive L, 92d Cong., 1st Sess. at 19. (Nov. 22, 1971).

legislation. This would, for example, call into serious question the integrity of the obligations of recipients not to make military use of U.S.-origin items or to retransfer them without U.S. consent. However, because of the character of such agreements, the application of this principle does not deprive the United States of the ability to enact new criteria or requirements for U.S. exports to ensure protection for U.S. non-proliferation or national security concerns.

All this is illustrated by the provisions of the China agreement. The agreement contains important non-proliferation obligations. There are commitments that nuclear material, facilities and components supplied by the United States, and their derivatives, will not be used for any military or explosive purpose, will not be retransferred without U.S. consent, and will be subjected to agreed levels of physical security. In addition, there are provisions requiring prior agreement of the parties if either plans to enrich to 20 percent or greater, reprocess, or alter in form or content such material or its derivatives, or plans to change locations for storage of weapons usable material. The binding nature of these commitments is the foundation of nuclear cooperation between the United States and China. The United States would find it intolerable if the Government of China were authorized to change any of these commitments at will; in that case the agreement would be illusory. Thus, the United States regarded acceptance of the principle set forth in the third sentence of paragraph one of article 2 of the agreement as an essential basis for nuclear cooperation.

At the same time, the United States has insisted on inclusion of a provision indicating that each party shall implement the agreement in accordance with its respective treaties, national laws, regulations and license requirements concerning the use of nuclear energy for peaceful purposes. This provision is contained in the second sentence of article 2 of the U.S.-China agreement. The provision does not give either of the parties the right to disregard specific obligations in the agreement. Rather, it deals with how those obligations, as well as the cooperation in general envisaged by the agreement, will be implemented. Here it is clear that implementation must conform to the respective applicable law, regulations, and licensing requirements of the Parties.

There are ways in which the enactment of a U.S. domestic law could hypothetically put the U.S. in breach of the agreement. This would be the case if the U.S. received nuclear items from China pursuant to the agreement and a law was enacted to force the U.S. to act inconsistently with its obligations concerning peaceful use or consent rights. However, it seems most unlikely that such a law would be enacted. Rather, legislative efforts would more likely be directed at U.S. export conditions. Here, the U.S. is protected since the agreement for cooperation does not commit either party to transfer any nuclear material, facility or components. It establishes a framework under which such transfers may take place but does not require such transfers. Thus, failure to permit the export of an item to China would not be a breach of the agreement. Moreover, since transfers and exports are a matter of implementation, not a matter of obligation, the second sentence of article 2 applies. U.S. laws, regulations and license requirements apply to the decision by the United States whether to permit the export of material, facilities or components to China.

Consequently, United States flexibility for the future is fully protected. If at any time legislation is enacted restricting further exports for non-proliferation or national security reasons, such restrictions could be observed without a breach of the agreement. (As noted above, the Executive Branch would, under our constitutional system, be obliged to carry out constitutionally valid legislation enacted by Congress, even where it might be argued to be inconsistent with previous international agreements.) Even if the U.S. were to take some action which the Chinese considered to be a breach of our obligations, this would not entitle them to disregard the guarantees contained in the agreement on use and disposition of U.S.-origin items. The agreement permits termination of further cooperation in the event of a breach of obligations (article 7(1)), but explicitly does not permit disregarding or non-observance of the guarantees and control provisions with respect to previous supply (article 10(2)). Thus, even in this unlikely eventuality, U.S. non-proliferation rights with respect to previous exports are preserved and protected.

The structure of rights and obligations described above is the same that applies generally to our agreements for peaceful nuclear cooperation. The situation that occurred when exports to India were considered in 1980 was entirely different. The 1963 agreement for cooperation between the United States and India was unusual in that it committed the United States to supply the fuel required for the operation of the Indian Tarapur reactors. The U.S.-China agreement, like other U.S. nuclear cooperation agreements, contains no such supply commitment. In the Indian case, the later enactment of the Nuclear Non-Proliferation Act of 1978 did not, in accordance with the principles reviewed in this memorandum, justify a U.S. failure to supply. Furthermore, since the Indian agreement did not contain a provision parallel to that in article 10(2) of the Chinese agreement, there was an issue as to whether Indian guarantees on the disposition of U.S.-origin fuel would survive a U.S. breach of its supply obligations. Thus, the Executive Branch continued, consistent with authorities in U.S. domestic law, to take required actions to supply those reactors until an alternate arrangement was in place for substitute French supply. The differences between the Tarapur agreement and the proposed China agreement are such that it is certain that the unique Indian situation will not reoccur in the Chinese case.

In summary, then, the provisions of the China agreement provide the best formulation, from the standpoint of U.S. interests, that could reasonably be expected with respect to the interplay between the international obligations and domestic law of the two parties.8/ In the area of export criteria, the U.S. Congress will retain all the flexibility needed to satisfy future non-proliferation or national security concerns without breaching U.S. obligations under the agreement. At the same time, in the area of guarantees against misuse of items received, the U.S. will retain the right to insist on the performance of China's obligations as the recipient of U.S. materials, regardless of what Chinese domestic law may provide or of whether the Chinese believe that we have breached our obligations.

8/ Hypothetically, a nuclear cooperation agreement could be written to contain a non-reciprocal provision explicitly requiring the recipient to comply with whatever U.S. law might require at any given time, regardless of U.S. obligations under the agreement. However, we have not asked any other recipients to accept such a provision, and it is certain that neither China nor any other recipient would accept such a one-sided and discriminatory requirement.

The CHAIRMAN. Thank you very much, Secretary Wolfowitz.

The Chair would like to recognize now Mr. Raymond J. Albright, Vice President of the Export-Import Bank of the United States.

Dr. Albright.

STATEMENT OF RAYMOND J. ALBRIGHT, VICE PRESIDENT—ASIA, EXPORT-IMPORT BANK OF THE UNITED STATES

Mr. ALBRIGHT. Thank you, Mr. Chairman.

I, too, have submitted my statement, and will summarize certain highlights if I may.

The CHAIRMAN. Very well.

Mr. ALBRIGHT. Thank you for this opportunity to discuss the Export-Import Bank's role in financing U.S. sales overseas of nuclear powerplants and equipment, with particular reference to the People's Republic of China.

I have been asked to address first, and briefly, the general question of financing nuclear plants.

Exim has had notable experience in financing such sales over the last 25 years. In fact, we have been the largest single source in the world for financing nuclear powerplants and equipment, supporting 50 nuclear powerplants worldwide.

The benefits to the American economy from these sales have been felt in employment, income, and tax revenues, not just to prime contractors, but to thousands of subsuppliers, both small and large, in all parts of the United States.

When an American lead supplier submits an application to Exim for a financing offer to accompany its technical and commercial bid, our review of the application focuses on such key areas as the following:

The technical feasibility of the project;

The existence of appropriate U.S. nuclear agreements with the purchasing country and other aspects of compliance with U.S. nonproliferation laws and policies, and review of the environmental aspects of the project. All of these foregoing are closely coordinated with the State Department.

We also look at the economic feasibility of the project and the borrower's financial capability to repay the project financing.

Also we review the possible effects of the host country's economic and financial situation on repayment of the project financing; and the availability of export financing support from other governments for their suppliers who may be competing for the sale.

If the U.S. supplier wins the bid, Eximbank reviews the case again at the time the foreign buyer applies for the Exim credit.

When our Board of Directors is prepared to give final approval, the transaction is first reviewed by the Executive Branch National Advisory Council on International Monetary and Financial Policies. It is then referred to the U.S. Congress by letter pursuant to section 2(B)(3) of the Eximbank Act of 1945, as amended, which requires notification to Congress 25 legislative days prior to final Exim approval of loans and/or guarantees for nuclear export sales.

While we believe that U.S. experience and technology in the nuclear field is still superior, these elements alone cannot win foreign sales if price and financing are not also competitive.

Exim support has been necessary in financing for two reasons—lack of capital availability and competition.

First, since nuclear powerplants can require up to 8 years or more to construct and 12 to 15 years for repayment of loans, commercial financing of foreign projects is generally not available without support from Government sources. The economic and political risks involved in this long a commitment period generally are beyond what private sources can accept without an Eximbank guarantee.

Second, foreign government export credit agencies have supported their exporters at interest rates which are subsidized below market rates.

To the extent that officially subsidized foreign financing is offered, Exim may be called upon to provide more favorable rates and terms of its own to offset that foreign government intervention.

Now, to restrain such foreign government intervention through trade distorting subsidies, the U.S. Government has successfully negotiated with other members of OECD agreements on interest rates, repayment terms, and other forms of Government support for export financing generally.

Special OECD rules on official financing for nuclear powerplants, however, were concluded on August 10, 1984, and are contained in the OECD Sector Understanding on Export Credits for Nuclear Power Plants.

The Nuclear Sector Understanding sets minimum interest rates for export loans with Government support and for China the rate is 10.85 percent.

Since the grace period during construction may be up to 8 years, the total term for a nuclear powerplant can be 23 years.

For comparison, U.S. Treasury securities with maturities of 20 to 30 years from today now yield 10.60 to 10.75 percent. Thus there is essentially no subsidy cost to the U.S. Government in providing an Eximbank credit today for a nuclear power project with a 23-year total term.

If private market rates decline sufficiently, Eximbank possibly could arrange competitive nuclear powerplant dollar credits from the private sector by using only its guarantee, and still provide credit at competitive sector rates without having to impact the Federal budget with its own direct credit.

By controlling interest rates, the 1984 Nuclear Sector Understanding will yield major reductions in subsidy costs. Moreover, this understanding explicitly prohibits the use of tied-aid or mixed credits for nuclear power financing, so that no portion of soft loans or aid grants may be added to the standard export credit portion to try to win the transaction.

In addition to reducing the subsidy content, the understanding rules will assure U.S. suppliers that they can compete on equal terms without unrestrained Government intervention, at least insofar as financing is concerned.

Let me turn to the question of possible Eximbank support for financing sales of U.S. nuclear powerplant equipment and services to China.

At present, the Bank does not have any applications pending for sales of nuclear related goods or services to China. We have advised both the U.S. suppliers and the Chinese that before Eximbank can consider an application, the proposed agreement for cooperation with the People's Republic of China concerning peaceful uses of nuclear energy must be in force.

Any such application for financial support which is subsequently received by the Bank will be reviewed like any other application for a project from anywhere else in the world and will be subject to the same criteria I have discussed earlier.

Let me emphasize that any such sales will be subject to all applicable U.S. laws and regulations relating to the types of goods, services, or technology that may be exported.

The People's Republic of China is one of the few countries outside the major supplier countries which is proceeding with an active program of nuclear powerplants. China has indicated plans for five projects at 2,000 megawatts each, for a total of 10,000 megawatts, with reports of possibly two additional projects.

However, the construction schedules are unclear, so that actual timing of sales benefits are also unclear. What is clear is that the commercial competition will be intense among potential suppliers from the United States and other countries.

Estimates vary as to the amount of goods and services which China may buy abroad for these projects because China wishes to increase progressively its domestic industrial capability to build nuclear powerplants.

Therefore, an estimate as high as $1.4 billion of imports for one of the first two projects could be reduced substantially by the time of the fifth project.

Chinese negotiators are likely to press for the best possible credit terms. United States suppliers have a variety of financing options at their disposal. If they use official Government supported export credit, the OECD sector understanding rules will apply, using a credit entirely from Eximbank or Eximbank combined with a private credit.

A further option is to arrange the entire financing from private sources with a guarantee from Exim.

I mention looking at private financing for another reason also, and that is the fact that certain currencies have become so-called low interest rate currencies. For example, the Japanese yen and Swiss franc markets have available for export credits 8 to 10 year fixed market interest rates at below 7.5 percent, compared to dollar rates at fixed rates of 11 to 13 percent.

Some overseas buyers have been borrowing in those low interest rate currencies to finance purchases from the United States because they want the low rates and are willing to make a long-term commitment in those currencies.

Eximbank has offered to help U.S. suppliers arrange financing in any major world currency, including low interest rate currencies, to help them offer buyers the most competitive possible financing.

A further technique which some suppliers may offer, including to China, is a foreign currency swap. Essentially, a swap would permit a borrower to take its export credit in dollars and exchange it with a private bank credit to another borrower in yen, or some other low interest rate currency. This can be arranged completely in the private markets without Eximbank involvement. Depending on interest rate trends in different countries, swaps can achieve a very attractive interest rate benefit to the parties.

There is one footnote that I should mention with respect to China and the Nuclear Sector Understanding of OECD. When the understanding was concluded, certain previous financing offers were outstanding to China from France, which it could not withdraw. These were so-called grandfathered by the agreement with all the other parties to the understanding agreeing to that. So, for two nuclear plant projects in China, French suppliers may offer financing with official support which does not conform to sector rules.

However, under the sector agreement, official export credit agencies from other countries may offer their suppliers matching support.

In conclusion, Mr. Chairman, I might say the United States nuclear plant suppliers are now considering plans for financing the nuclear powerplants in China on which they will wish to bid. At such time as the proposed agreement for nuclear energy cooperation enters into force, Eximbank will be prepared to assist them to offer financing which is competitive with financing being offered by suppliers from other countries with the support of their governments.

We would be prepared to answer your questions, Mr. Chairman. Thank you.

[Mr. Albright's prepared statement follows:]

PREPARED STATEMENT OF RAYMOND J. ALBRIGHT

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR GIVING THE EXPORT-IMPORT BANK THE OPPORTUNITY TO MEET WITH YOU TODAY TO DISCUSS THE BANK'S ROLE IN FINANCING U.S. SALES OVERSEAS OF NUCLEAR POWER PLANTS AND EQUIPMENT, WITH PARTICULAR REFERENCE TO THE PEOPLE'S REPUBLIC OF CHINA. I HAVE BEEN ASKED TO ADDRESS FIRST THE GENERAL QUESTION OF FINANCING NUCLEAR PLANTS.

EXIM HAS HAD NOTABLE EXPERIENCE IN FINANCING SUCH SALES OVER THE LAST 25 YEARS. IN FACT, WE HAVE BEEN THE LARGEST SINGLE SOURCE IN THE WORLD FOR FINANCING NUCLEAR POWER PLANTS AND EQUIPMENT. SINCE 1959 WE HAVE MADE MORE THAN $7.6 BILLION IN FINANCING COMMITMENTS IN THE FORM OF DIRECT CREDITS AND FINANCIAL GUARANTEES WHICH HAVE SUPPORTED EXPORTS OF U.S. GOODS AND SERVICES OF $8.8 BILLION FOR 50 NUCLEAR POWER PLANTS WORLDWIDE.

THE BENEFITS TO THE AMERICAN ECONOMY FROM THESE SALES HAVE BEEN FELT IN EMPLOYMENT, INCOME AND TAX REVENUES. WHILE MAJOR U.S. SUPPLIERS, AS PRIME CONTRACTORS, HAVE TAKEN THE LEAD IN DEVELOPING THESE EXPORT SALES, THE ECONOMIC BENEFITS HAVE BEEN ENJOYED BY THOUSANDS OF SUB-SUPPLIERS BOTH SMALL AND LARGE IN ALL PARTS OF THE UNITED STATES.

THE LEVEL OF EXIMBANK ACTIVITY IN THE NUCLEAR POWER SECTOR HAS DEPENDED ON THE DEMAND FOR NUCLEAR POWER CONSTRUCTION IN THE WORLD AND THE INITIATIVE OF U.S. SUPPLIERS IN BIDDING ON THE PROJECTS WHICH ARE PLANNED IN FOREIGN COUNTRIES. EACH AMERICAN LEAD SUPPLIER SUBMITS AN APPLICATION TO EXIMBANK FOR A FINANCING OFFER TO ACCOMPANY ITS TECHNICAL AND COMMERCIAL BID. OUR REVIEW OF THE APPLICATION FOCUSES ON SUCH KEY AREAS AS THE FOLLOWING:

- THE TECHNICAL FEASIBILITY OF THE PROJECT AS SUBMITTED TO EXIMBANK, INCLUDING REASONABLENESS OF COST AND CONSTRUCTION SCHEDULE ESTIMATES AND THE ABILITY OF THE CONTRACTORS TO COMPLETE THE WORK WITHIN THEIR ASSIGNED SCOPE OF SUPPLY,

- THE EXISTENCE OF APPROPRIATE U.S. NUCLEAR AGREEMENTS WITH THE PURCHASING COUNTRY AND OTHER ASPECTS OF COMPLIANCE WITH U.S. NON-PROLIFERATION LAWS AND POLICIES AND REVIEW OF THE ENVIRONMENTAL ASPECTS OF THE PROJECT, ALL OF WHICH IS CLOSELY COORDINATED WITH THE STATE DEPARTMENT,

- THE ECONOMIC FEASIBILITY OF THE PROJECT AND THE BORROWER'S FINANCIAL CAPABILITY TO REPAY THE PROJECT FINANCING,

- THE POSSIBLE EFFECTS OF THE HOST COUNTRY'S ECONOMIC AND FINANCIAL SITUATION ON REPAYMENT OF THE PROJECT FINANCING, AND

- THE AVAILABILITY OF EXPORT FINANCING SUPPORT FROM OTHER GOVERNMENTS FOR THEIR SUPPLIERS WHO MAY BE COMPETING FOR THE SALE.

If the U.S. supplier wins the bid, Eximbank reviews the case again at the time the foreign buyer applies for the Exim credit. This review is done in order to assess any changes from the proposals we received prior to our initial review. When the Eximbank Board of Directors is prepared to give final approval to the credit, the transaction is first reviewed by The National Advisory Council on International Monetary and Financial Policies (NAC). It is then referred to the U.S. Congress by letter pursuant to Section 2(b)(3) of the Export-Import Bank Act of 1945, as amended, which requires notification to Congress 25 legislative days prior to final Exim approval of loans and/or guarantees for nuclear export sales.

Over the past decade we have seen the technical ability of suppliers in foreign countries grow to the point where they can provide equipment and services for nuclear power plants which are fully competitive with U.S. products. While we believe that U.S. experience and technology in the field is still superior, these elements alone cannot win foreign sales if price and financing are not also competitive. Moreover, new orders are important for maintaining a technological edge.

Eximbank's support has been necessary for two reasons -- lack of capital availability and competition. First, since nuclear power plants can require up to eight years or more to construct and 12 to 15 years for repayment of loans, commercial financing of foreign projects

IS GENERALLY NOT AVAILABLE WITHOUT SUPPORT FROM GOVERNMENT SOURCES. THE ECONOMIC AND POLITICAL RISKS INVOLVED IN THIS LONG A COMMITMENT PERIOD GENERALLY ARE BEYOND WHAT PRIVATE SOURCES CAN ACCEPT WITHOUT AN EXIMBANK GUARANTEE. SECOND, FOREIGN GOVERNMENT EXPORT CREDIT AGENCIES HAVE SUPPORTED THEIR EXPORTERS AT INTEREST RATES WHICH ARE SUBSIDIZED BELOW MARKET RATES.

THE SPECIFIC SUPPORT IN TERMS OF FINANCIAL GUARANTEES, DIRECT CREDITS, GRACE PERIODS, REPAYMENT PERIODS AND INTEREST RATES WHICH EXIM HAS OFFERED TO SPECIFIC PROJECTS IN THE PAST HAS VARIED ACCORDING TO THE CONSTRUCTION PERIOD, BORROWER FINANCIAL CAPABILITY, CAPITAL MARKET CONDITIONS AND FOREIGN COMPETITION. MOREOVER, TO THE EXTENT THAT OFFICIALLY SUBSIDIZED FOREIGN FINANCING IS OFFERED, EXIMBANK MAY BE CALLED UPON TO PROVIDE MORE FAVORABLE RATES AND TERMS OF ITS OWN TO OFFSET THAT FOREIGN GOVERNMENT INTERVENTION.

IN GENERAL, TO RESTRAIN SUCH FOREIGN GOVERNMENT INTERVENTION THROUGH TRADE-DISTORTING SUBSIDIES, THE U.S. GOVERNMENT HAS SUCCESSFULLY NEGOTIATED WITH OTHER MEMBERS OF OECD (ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT) AGREEMENTS ON INTEREST RATES, REPAYMENT TERMS AND OTHER FORMS OF GOVERNMENT SUPPORT FOR EXPORT FINANCING. INTEREST RATES ARE ADJUSTED AUTOMATICALLY EVERY SIX MONTHS DEPENDING ON THE MOVEMENT OF COMPARABLE MARKET RATES OF INTEREST. THESE AGREEMENTS ARE SET FORTH IN THE OECD ARRANGEMENT ON GUIDELINES FOR OFFICIALLY SUPPORTED EXPORT CREDITS. SPECIAL OECD RULES ON OFFICIAL FINANCING FOR NUCLEAR POWER PLANTS, HOWEVER, WERE CONCLUDED ON AUGUST 10, 1984 AND ARE CONTAINED IN THE OECD SECTOR UNDERSTANDING ON EXPORT

Credits for Nuclear Power Plants. Previously, the only guidelines on nuclear power plants had required a 10 percent downpayment and a maximum repayment term of 15 years, leaving much room for interest rate subsidies.

The Nuclear Sector Understanding limits the potential interest rate subsidy to a rate which is 100 basis points above the OECD Arrangement rates provided the subsidized portion of the credit extends for the full fifteen year repayment term. The Arrangement rate today for a developing country like China is 9.85 percent; thus the nuclear sector rate would be 10.85 percent. If the buyer is willing to repay the last 8 years at market rates, the officially supported rate for the first 8 years of construction and first 7 years of repayment may be 25 basis points less, or 10.65 percent in China's case.

Since the grace period during construction may be up to 8 years, the total term for a nuclear power plant can be 23 years. For comparison, U.S. Treasury securities with maturities 20 to 30 years from today now yield 10.60 percent to 10.75 percent. Thus there is essentially no subsidy cost to the U.S. Government in providing an Eximbank credit today for a nuclear power project with a 23 year total term. If private market rates decline sufficiently Eximbank possibly could arrange future nuclear power plant dollar credits from the private sector by using only its guarantee without having to impact the federal budget with its own direct credit.

Before the Sector Understanding, nuclear plants were being offered rates by other governments as low as 7.75 percent in dollars when comparable U.S. Treasury rates were as high as 14 percent. Thus, by controlling interest rates the August 1984 Nuclear Sector Understanding will yield major reductions in subsidy costs for official support to future financing of nuclear plants which today exceed a billion dollars in construction costs. Moreover, this Understanding explicitly prohibits the use of tied-aid or mixed credits for nuclear power financing, so that no portion of soft loans or aid grants may be added to the standard export credit portion to try to win a transaction.

In addition to reducing the subsidy content in nuclear plant financing, the Nuclear Understanding rules for financing support to future nuclear power project exports will assure U.S. suppliers that they can compete on equal terms, without government intervention, at least so far as financing is concerned. For the record, I am attaching to this statement the text of the news release by the Department of the Treasury on August 1, 1984 which describes the guidelines contained in the Sector Understanding.

I WOULD LIKE NOW TO ADDRESS THE QUESTION OF POSSIBLE EXIMBANK SUPPORT FOR FINANCING SALES OF U.S. NUCLEAR POWER PLANT EQUIPMENT AND SERVICES TO CHINA. AT THE PRESENT TIME, THE BANK DOES NOT HAVE ANY APPLICATIONS PENDING FOR SALES OF NUCLEAR-RELATED GOODS OR SERVICES TO CHINA. WE HAVE HAD INFORMAL DISCUSSIONS WITH U.S. SUPPLIERS ABOUT THEIR PLANS FOR SALES TO CHINA. WE HAVE ALSO HEARD FROM CHINESE OFFICIALS IN VERY GENERAL TERMS ABOUT THEIR PLANS TO DEVELOP NUCLEAR POWER, AMONG OTHER SOURCES, TO MEET THEIR EXTENSIVE NEEDS TO INCREASE ENERGY FOR THEIR ECONOMIC DEVELOPMENT. WE HAVE ADVISED BOTH THE SUPPLIERS AND THE CHINESE THAT BEFORE EXIMBANK CAN CONSIDER AN APPLICATION FOR FINANCING SUPPORT, THE PROPOSED AGREEMENT FOR COOPERATION WITH THE PRC CONCERNING PEACEFUL USES OF NUCLEAR ENERGY MUST BE IN FORCE. ANY SUCH APPLICATION FOR FINANCIAL SUPPORT WHICH IS SUBSEQUENTLY RECEIVED BY EXIMBANK WILL BE REVIEWED LIKE ANY OTHER APPLICATION FOR A PROJECT FROM ANYWHERE ELSE IN THE WORLD AND WILL BE SUBJECT TO THE SAME CRITERIA I HAVE DISCUSSED EARLIER. LET ME EMPHASIZE THAT ANY SUCH SALES WILL BE SUBJECT TO ALL APPLICABLE U.S. LAWS AND REGULATIONS RELATING TO THE TYPES OF GOODS, SERVICES OR TECHNOLOGY THAT MAY BE EXPORTED.

I UNDERSTAND THAT THE COMMITTEE IS PARTICULARLY INTERESTED IN THE FOLLOWING:

1. COMMERCIAL OPPORTUNITIES FOR U.S. SUPPLIERS IN THE PRC,

2. PRC EXPECTATIONS AS TO POSSIBLE FINANCING ARRANGEMENTS FOR NUCLEAR POWER PLANTS,

3. Financing practices of U.S. competitors and

4. Financing arrangements required for U.S. suppliers to be competitive in the PRC market.

The PRC is one of the few countries outside the major supplier countries which is proceeding with an active program of nuclear power plants. They have one project for a 300 MW unit under construction but for larger units they are looking to imports. One project for two 1,000 MW units at Daya Bay in Guangdong Province is in active negotiation with French and British firms in the lead. Negotiations have also begun for the Sunan project of two 1,000 MW units near Shanghai, with German firms being particularly active. The PRC has indicated plans for five such projects for a total of 10,000 MW, with reports of possibly two additional projects. However, the construction schedules are unclear so that actual timing of sales benefits are also unclear. What is clear is that the commercial competition will be intense among potential suppliers from the U.S. and other countries.

Estimates vary as to the amount of goods and services which China may buy abroad for these projects, because China wishes to increase progressively its domestic industrial capability to build nuclear power plants as more plants are built. Therefore, an estimate as high as $1.4 billion of imports for one of the first two projects could be reduced substantially by the time of the fifth project.

Chinese negotiators are likely to press for the best possible credit terms for these projects. U.S. suppliers have a variety of financing options at their disposal. If they use official government supported export credit, the OECD Sector Understanding rules will apply. As I mentioned, this support could provide an interest subsidy for the full fifteen year repayment, or for 7 years of the repayment period if the last 8 years are financed privately at market interest rates. If needed, a guarantee for that latter portion can be provided by official sources. A further option is to arrange the entire financing from private sources with a guarantee from official export credit agencies. However, financing for a total term of 23 years is only available from a limited number of private sources, even with an Eximbank guarantee.

One reason for looking at private financing is the fact that certain currencies have become so-called low interest rate currencies. For example, the Japanese yen and Swiss franc markets have available for export credits 8 to 10 year fixed market interest rates at below 7.5 percent compared to the dollar at fixed rates of 11 to 13 percent. For longer repayment loans similar spreads also can be expected between rates in these different currencies. Some borrowers have been borrowing in those low-interest currencies to finance purchases from the U.S., because they want the low rates and are willing to make a long-term commitment in those currencies.

NON-U.S. SUPPLIERS WITH CURRENCIES AT MARKET RATES BELOW THE SECTOR RULES -- THAT IS, THE JAPANESE, GERMANS AND SWISS -- MAY OFFER ONLY THEIR PRIVATE MARKET INTEREST RATES IN EXPORT FINANCING, AND IN FULL COMPLIANCE WITH OECD AGREEMENTS. SUPPLIERS FROM THE U.S., FRANCE, THE U.K. AND OTHER COUNTRIES WITH CURRENCIES ABOVE THE SECTOR RULES ARE REQUIRED TO FOLLOW THE SECTOR RATES, IF THEY ARE BIDDING IN THEIR OWN CURRENCIES. OF COURSE, AS I MENTIONED, SUPPLIERS FROM THESE LATTER COUNTRIES ALSO COULD ARRANGE FINANCING IN OTHER CURRENCIES THAN THEIR OWN IN ORDER TO OFFER FINANCING FROM A LOW-INTEREST RATE CURRENCY. EXIMBANK HAS OFFERED TO HELP U.S. SUPPLIERS ARRANGE FINANCING IN ANY MAJOR WORLD CURRENCY, INCLUDING LOW-INTEREST RATE CURRENCIES, TO HELP THEM OFFER BUYERS THE MOST COMPETITIVE POSSIBLE FINANCING.

A FURTHER TECHNIQUE WHICH SOME SUPPLIERS MAY OFFER IS A FOREIGN CURRENCY SWAP. COMMERCIAL BANKS HAVE DEVELOPED EFFICIENT TECHNIQUES AND LARGE VOLUMES OF FOREIGN CURRENCY SWAPS IN RECENT YEARS. ALTHOUGH SWAPS ARE NORMALLY LIMITED TO A MAXIMUM OF TEN YEARS, IF A NUCLEAR PLANT FINANCING IS DIVIDED INTO OFFICIAL CREDITS AND PRIVATE CREDITS IT COULD BE POSSIBLE TO SWAP THE SEPARATE CREDIT PACKAGES. ESSENTIALLY, A SWAP WOULD PERMIT A BORROWER TO TAKE ITS EXPORT CREDIT IN DOLLARS AND EXCHANGE IT WITH A PRIVATE BANK CREDIT TO ANOTHER BORROWER IN YEN OR SOME OTHER LOW INTEREST RATE CURRENCY. THIS CAN BE ARRANGED COMPLETELY IN THE PRIVATE MARKETS WITHOUT EXIMBANK INVOLVEMENT IN THE SWAPS MECHANICS. DEPENDING ON INTEREST RATE TRENDS IN DIFFERENT COUNTRIES SWAPS CAN ACHIEVE VERY ATTRACTIVE INTEREST RATE BENEFITS TO THE PARTIES.

I MENTION ALL OF THESE TECHNIQUES TO INDICATE THE RANGE OF OPTIONS WHICH SUPPLIERS FROM THE U.S. MAY BE ABLE TO OFFER THE PRC. SUCH OPTIONS WOULD BE EQUALLY AVAILABLE TO U.S. SUPPLIERS AND THEIR COMPETITORS FROM OTHER COUNTRIES.

THERE IS ONE FOOTNOTE THAT I SHOULD MENTION WITH RESPECT TO CHINA AND THE NUCLEAR SECTOR UNDERSTANDING. WHEN THE UNDERSTANDING WAS CONCLUDED CERTAIN PREVIOUS FINANCING OFFERS WERE OUTSTANDING TO CHINA FROM FRANCE WHICH IT COULD NOT WITHDRAW. THESE WERE "GRANDFATHERED" BY AGREEMENT WITH ALL OTHER PARTIES TO THE UNDERSTANDING, SO FOR TWO NUCLEAR PLANT PROJECTS IN CHINA THE FRENCH SUPPLIERS MAY OFFER FINANCING WITH OFFICIAL SUPPORT WHICH DOES NOT CONFORM TO SECTOR RULES. HOWEVER, OFFICIAL EXPORT CREDIT AGENCIES FROM OTHER COUNTRIES MAY OFFER THEIR SUPPLIERS MATCHING SUPPORT.

CHINESE NEGOTIATORS MAY ALSO ASK FOREIGN SUPPLIERS TO ARRANCE BARTER OR COUNTERTRADE TO HELP FINANCE NUCLEAR POWER PLANT PURCHASES. CHINA HAS SHOWN INTEREST IN THIS APPROACH WITH OTHER MAJOR PROJECTS IN CHINA WHICH REQUIRE LARGE IMPORTS FROM ABROAD. THESE MECHANISMS WOULD SUBSTITUTE DELIVERY OF GOODS FROM CHINA THROUGH LONG-TERM CONTRACTS FOR FINANCIAL CREDITS TO A PRC BORROWER. FOR EXAMPLE, AN INTERMEDIARY TRADING COMPANY COULD AGREE WITH THE PRC BUYER TO PAY THE NUCLEAR POWER PLANT SUPPLIER ACCORDING TO HIS SALES CONTRACT. THE INTERMEDIARY WOULD ARRANGE ANY FINANCING IT NEEDED FOR THIS PURPOSE AND THEN TRANSLATE THE FINANCING REPAYMENT SCHEDULE PLUS INTEREST INTO A TOTAL PAYMENT SCHEDULE. GOODS WOULD BE SHIPPED FROM CHINA TO THE

INTERMEDIARY COMPANY WHICH WOULD SELL THESE GOODS TO MAKE THE PAYMENT ACCORDING TO THE SCHEDULE REQUIRED BY ITS FINANCING. GERMAN NUCLEAR PLANT SUPPLIERS ARE REPORTED TO HAVE HELD EXTENSIVE NEGOTIATIONS WITH THE PRC ON SUCH AN APPROACH.

IF U.S. SUPPLIERS SHOULD UNDERTAKE SUCH COUNTER-TRADE ARRANGEMENTS EXIMBANK WOULD NOT BE INVOLVED; EXIM ENGAGES ONLY IN LOANS TO THE BUYERS, EITHER WITH ITS DIRECT CREDIT OR ITS GUARANTEE OF PRIVATE FINANCING.

U.S. NUCLEAR PLANT SUPPLIERS ARE NOW CONSIDERING PLANS FOR FINANCING THE NUCLEAR POWER PLANTS IN CHINA ON WHICH THEY WILL WISH TO BID. AT SUCH TIME AS THE PROPOSED AGREEMENT FOR NUCLEAR ENERGY COOPERATION ENTERS INTO FORCE, EXIMBANK WILL BE PREPARED TO ASSIST THEM TO OFFER FINANCING WHICH IS COMPETITIVE WITH FINANCING BEING OFFERED BY SUPPLIERS FROM OTHER COUNTRIES WITH THE SUPPORT OF THEIR GOVERNMENTS.

MR. CHAIRMAN, I AM PREPARED TO RESPOND TO QUESTIONS FROM THE COMMITTEE. THANK YOU.

ATTACHMENT

TREASURY NEWS
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OECD Sector Understanding on Export Credits for Nuclear Power Plants

Treasury Secretary Donald Regan announced today that the OECD countries have reached an understanding on new financing terms for exports of nuclear power plants and related services. "We welcome this arrangement as another step forward in our efforts to eliminate trade-distorting export credit subsidies," he said. "Because of the high cost involved in the construction and commissioning of a nuclear plant, reducing the subsidy element of financing by even one percentage point can save export credit agencies as much as $200 million over the life of the loan. The arrangement also sets an important precedent in that it includes a prohibition on mixed credit financing."

Rules on official financing for nuclear power plant exports until now have not been included in the OECD Arrangement on Guidelines for Officially Supported Export Credits, but instead have been delineated in a "standstill" agreement. The 1975 "standstill" specified only that there be a minimum cash down payment of 10 percent and a maximum repayment term of 15 years. Consequently, the latitude for subsidization in this important sector has been great.

The highlights of the new nuclear understanding, which will take effect August 10, 1984, are as follows:

Scope

The arangement covers complete nuclear power stations and parts thereof, including components, equipment, materials, and services required for the construction and commissioning of the plant.

Financing Options

Option 1:

-- A 15-year maximum repayment term option (plus construction period) at a minimum interest rate 100, 100, and 150 basis points above OECD Arrangement rates for Categories I (relatively rich), II (intermediate), and III (poorest), respectively.

Option 2:

-- A two tranche financing where the minimum interest rate is fixed at 25 basis points below Option 1 rates for the first 15 years (including construction period). Thereafter the interest rate on the remaining repayment period would be a "market" rate (pure cover or special commercial interest reference rates). Maximum term of the second tranche would be eight years.

Tied Aid Credits

-- Participants will not provide tied aid credits, give grants or provide any other kind of financing at credit conditions more favorable than in the nuclear arrangement.

Local Cost and Capitalization of Interest

-- Official support for local cost financing and capitalization of interest for high interest rate currencies is limited jointly to not more than 15 percent of the export value.

Fuel

-- Official support for the initial fuel load, plus the next two replacement loads, is limited to four-year repayment terms at the OECD Arrangement rates of interest.

-- Official support for subsequent reloads and uranium enrichment services shall be made available at two-year maximum repayment terms, without interest subsidy (i.e., at commercial interest reference rates (CIRRs), or with guarantees or insurance) with prior notification if the term is greater than six months.

-- Participants will not provide official support for fuel reprocessing or waste disposal.

Free Fuel or Services

-- Participants will not provide free nuclear fuel or services.

Special Commercial Interest Reference Rates

-- Special CIRRs, with an appropriate markup to reflect longer repayment terms, are being developed for low interest rate currencies.

Partial Suppliers

-- Where a partial supplier provides equipment for which it has no commissioning responsibility, it may offer interest rates in accordance with the OECD Arrangement for Category I countries (commercial interest reference rates for low interest rate currencies and 12.4 percent for other currencies). The maximum repayment term will be 10 years.

The **Chairman**. Thank you very much, Dr. Albright.

The Chair would recognize now Mr. Michael Matheson, the Deputy Legal Adviser of the Department of State.

Mr. Matheson.

STATEMENT OF MICHAEL J. MATHESON, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

Mr. **Matheson**. Thank you, Mr. Chairman.

I have also submitted for the record a prepared statement and some additional material relating to the legal issues about this proposed agreement. I would like simply to highlight a few of the more important points at this time.

In transmitting this agreement to the Congress, President Reagan stated that he had found that it met all applicable requirements of the Atomic Energy Act, as amended, and, therefore, required no exemption from any of the requirements of section 123 of the act.

In doing so, he was acting on the unanimous advice of the Secretaries of State and Energy, the Director of the Arms Control and Disarmament Agency, and the legal offices of all the concerned Federal agencies.

My prepared statement reviews the applicable requirements of section 123 of the act and the manner in which the agreement satisfies each of them.

Specific questions have been raised with respect to two of these requirements which I would like to address briefly now.

Paragraph 1 of section 123(A) requires that safeguards, as set forth in the agreement, be maintained for as long as the items subject to the agreement are under the jurisdictional control of the cooperating party. This requirement is met by article 10, paragraph 2 of the agreement, which applies to the provisions concerning use, retransfer, and physical security, as well as the provisions of article 8, paragraph 2, that contemplate exchanges of information and visits with respect to the materials and facilities that are subject to the agreement.

The agreement does not provide for IAEA safeguards which are not required for nuclear weapon states by either the Atomic Energy Act or the Nonproliferation Treaty. But, as Ambassador Kennedy has noted, neither does the agreement preclude items subject to the agreement from being safeguarded by the IAEA pursuant to the voluntary safeguards offer the Chinese announced last month at the IAEA general conference.

We believe that the arrangements contemplated by the agreement will provide effective assurance that its provisions will be carried out.

Paragraphs 7 and 8 of section 123(A) require that no new nuclear material subject to the agreement be enriched, reprocessed, altered in form or content, or in the case of weapons-usable materials, stored without the prior approval of the United States. This requirement is met by article 5, paragraph 2 of the agreement.

The Chinese understood these legal requirements of the United States and said they had no plans to undertake the activities in question, but were concerned to insure that, in the event of possible future Chinese changes of plans, the United States would give a timely response to any Chinese request.

While the language that was negotiated is different from that appearing in other agreements, it does clearly provide that China may not engage in any of the specified activities without the agreement of the United States. If long-term arrangements are not agreed upon, the agreement makes clear that each side will refrain from such activities if either side objects.

Both the United States and China understand this.

I have attached to my prepared statement a legal memorandum which discusses these points in much greater detail.

At this point, sir, I would be happy to answer any questions about these or any other legal aspects of the proposed agreement.

Thank you.

[Mr. Matheson's prepared statement follows:]

PREPARED STATEMENT OF MICHAEL J. MATHESON

Mr. Chairman:

I am pleased to appear before this Committee today to discuss the legal aspects of the proposed agreement between the United States and the People's Republic of China concerning the peaceful uses of nuclear energy.

In transmitting the agreement to Congress, President Reagan stated that he had found that the agreement met all applicable requirements of the Atomic Energy Act, as amended, and therefore required no exemption from any of the requirements of Section 123 of the Act. In doing so, he was acting on the unanimous advice of the Secretaries of State and Energy, the Director of the Arms Control and Disarmament Agency, and the legal offices of all concerned federal agencies. I would like to briefly review why we have concluded that the proposed agreement with China fully meets all of the requirements of U.S. law, in particular those specified in Section 123 of the Act for nuclear cooperation agreements with nuclear weapon states.

Section 123 requires that such agreements contain several guarantees by the cooperating party. One guarantee is that no nuclear materials or equipment subject to the agreement will be used for any nuclear explosive device, for research on or development of any nuclear explosive device, or for any other military purpose. This requirement is met by Article 5, paragraph 3 of the proposed agreement.

A second guarantee required is that no nuclear material or equipment subject to the agreement will be transferred to unauthorized persons or beyond the jurisdiction or control of the cooperating party without the consent of the U.S. This requirement is met by Article 5, paragraph 1 of the agreement.

A third guarantee required is that adequate physical security will be maintained with respect to any nuclear material subject to the agreement. This requirement is met by Article 6 of the agreement.

A fourth guarantee required is that no nuclear material subject to the agreement will be enriched, reprocessed, altered in form or content, or (in the case of weapons-usable materials) stored without the prior approval of the U.S. This requirement is met by Article 5, paragraph 2, of the agreement. The Chinese understood these U.S. legal requirements and said they had no plans to undertake the activities in question, but were concerned to ensure that, in the event of possible future Chinese changes of plans, the U.S. would give a timely response to any Chinese request. While the language that was negotiated is different from that appearing in other agreements, it does clearly provide that China may not engage in any of the specified activities without the agreement of the United States. If long-term arrangements are not agreed upon, the agreement makes clear that each side will refrain from such activities if either side objects. Both the U.S. and China understand this.

All of these guarantees are reciprocal in nature and would apply to Chinese exports to the U.S. They are in substance identical to those in all our other post 1978 agreements.

A fifth guarantee required is that safeguards as set forth in the agreement be maintained for as long as items subject to the agreement are under the jurisdiction or control of the cooperating party. This requirement is met by Article 10, paragraph 2 of the agreement, which applies to all of the above guarantees and also to the provisions of Article 8, paragraph 2 that contemplate exchanges of information and visits with respect to the materials and facilities subject to the agreement. The agreement does not provide for International Atomic Energy Agency safeguards on nuclear material, equipment or facilities subject to the agreement since they are not required for nuclear-weapon states by either the Atomic Energy Act or the Non-Proliferation Treaty. But neither does the agreement preclude items subject to the agreement from being safeguarded by the IAEA pursuant to the voluntary safeguards offer the Chinese announced last month at the IAEA General Conference. We believe that the arrangements contemplated by the agreement will provide effective assurance that its provisions will be carried out, given the nuclear-weapon status of China.

Attached to my statement is a legal memorandum which discusses several of these points in greater detail, and in particular addresses questions which have been raised concerning the provisions of the agreement on safeguards and consent for reprocessing.

Legal Memorandum Prepared by the Executive Branch on Issues Relating to the Agreement for Cooperation Between the United States and the People's Republic of China Concerning Peaceful Uses of Nuclear Energy

A number of questions have been raised as to whether the proposed Agreement for Cooperation between the Government of the United States of America and the Government of the People's Republic of China Concerning Peaceful Uses of Nuclear Energy[1/] meets the requirements set forth in section 123 of the Atomic Energy Act of 1954, as amended ("AEA"). In particular, it has been asserted that the agreement does not meet the requirements of paragraph (a) (1) of this section, concerning safeguards, or the requirements of paragraph (a) (7) of this section, concerning reprocessing and other fuel cycle activities. Acting upon the unanimous advice of the Secretaries of State and Energy[2/] and the Director of the Arms Control and Disarmament Agency,[3/] the President concluded that these requirements of law had been met.[4/] This memorandum sets forth in detail the reasoning behind that conclusion. The Nuclear Regulatory Commission also concluded that these statutory requirements had been met.

[1/] The agreement was transmitted to the Congress by the President on July 24, 1985, pursuant to sections 123(b) and 123(d) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2153(b), (d)). House Doc. 99-86, 99th Cong., 1st Sess. (July 24, 1985).

[2/] Id. at 50-51.

[3/] Id. at 22, 30-33, 37, 58.

[4/] Id. at 2.

Safeguards

Section 123(a)(1) of the AEA, as amended by the Nuclear Non-Proliferation Act of 1978 ("NNPA"),[5] specifies that the proposed agreement for cooperation must contain:

> a guaranty by the cooperating party that safeguards as set forth in the agreement for cooperation will be maintained with respect to all nuclear materials and equipment transferred pursuant thereto, and with respect to all special nuclear material used in or produced through the use of such nuclear materials and equipment, so long as the material or equipment remains under the jurisdiction or control of the cooperating party, irrespective of the duration of other provisions in the agreement or whether the agreement is terminated or suspended for any reason. . . .

Article 8 of the agreement contains the following provisions:

> 2. The parties recognize that this cooperation in the peaceful uses of nuclear energy is between two nuclear weapon states and that bilateral safeguards are not required. In order to exchange experience, strengthen technical cooperation between the parties, ensure that the provisions of this agreement are effectively carried out, and enhance a stable, reliable, and predictable nuclear cooperation relationship, in connection with transfers of material, facilities and components under this agreement, the parties will use diplomatic channels to establish mutually acceptable arrangements for exchanges of information and visits to material, facilities and components subject to the agreement.

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[5] 42 U.S.C. 2153 (a)(1).

> 3. The parties shall exchange views and information on the establishment and operation of their respective national accounting and control systems for source and special nuclear material subject to this agreement.[6]

Paragraph 2 of article 10 provides:

> 2. Notwithstanding the suspension, termination or expiration of this agreement, or any cooperation hereunder for any reason, the provisions of Articles 5, 6, 7, and 8 shall continue in effect so long as any material, facility, or components subject to these articles remain in the territory of the party concerned or any material, facility or components subject to these articles remain subject to the party's right to exercise jurisdiction or to direct disposition elsewhere.[7]

The AEA requires that safeguards "as set forth in the agreement" be maintained for the life of items subject to the agreement, irrespective of the duration of the agreement itself. Under the Nuclear Non-Proliferation Treaty and section 127(1) of the AEA, 42 U.S.C. 2156(1), International Atomic Energy Agency (IAEA) safeguards are only required as a condition for nuclear exports to non-nuclear weapon states. Therefore, IAEA safeguards are not provided for in this agreement with a nuclear-weapon state. Article 8(2), however, provides for arrangements for exchanges of information and visits by U.S. Government officials to material, facilities and components subject to the agreement. The article provides that

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6/ Id. at 13-14.

7/ Id. at 15.

mutually acceptable arrangements for such visits and information exchanges are to be established "in connection with transfers"; consequently, these arrangements will be a prerequisite for the approval by the U.S. of any exports under the agreement. The U.S. has assumed no obligation to approve exports and need not do so until it is satisfied that appropriate arrangements are in place. Article 8(2), together with article 10(2), which provides that certain provisions, including this one, shall continue for the life of the items to which they apply, meets the requirement of section 123(a)(1).

It has been argued, however, that the "safeguards" required by section 123(a)(1) are those equivalent to the safeguards of the IAEA, as provided for in the safeguards agreement between the United States and the IAEA.[8/] Thus, it is asserted that an agreement for cooperation must contain the basic features of material accountancy, containment and surveillance of nuclear material and inspections, and that while each feature of the proposed agreement need not track the U.S. agreement with the IAEA, an agreement not containing those basic elements does not meet the requirement of section 123(a)(1). Consequently, it is asserted that the proposed agreement for cooperation with China

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[8/] Agreement Between the United States and the International Atomic Energy Agency for the Application of safeguards in the United States of America, Nov. 18, 1977, - U.S.T. -, T.I.A.S. No. 9889.

does not meet this requirement of U.S. law. This assertion, however, is incorrect. The interpretation of section 123(a)(1) on which it is based is neither supported by the text of the law nor the practice of the United States in its agreements for peaceful nuclear cooperation since enactment of the AEA in 1954.

The text of the statute on its face clearly does not require either IAEA safeguards or safeguards having equivalent characteristics. No specific safeguards system is mandated by section 123(a)(1). The section requires only that "safeguards as set forth in the agreement for cooperation" have a specified duration. The fact that IAEA or equivalent safeguards are not required is also seen by comparing section 123(a)(1) with sections 123(a)(2) and 127(1) (42 U.S.C. 2153(a)(2), 2156(1)), each of which specifically requires "IAEA safeguards". Other provisions of the AEA and NNPA make specific reference to "IAEA safeguards".[9/] These provisions make clear that where Congress intended a section in the law specifically to require IAEA safeguards, it so provided. Similarly, where the equivalent of IAEA safeguards could satisfy a provision of law, Congress so specified. Section 126(a)(2) allows the Nuclear Regulatory Commission, in making export licensing determinations, to find that "the criteria in section 127 of

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[9/] 22 U.S.C. 3241, 3281(a)(1)(D), 42 U.S.C. 2139(b)(1), 2153b(a)(2), 2157(a)(1), 2158(1)(C).

this Act or their equivalent . . . are met," 42 U.S.C. 2155(a)(2). In sharp distinction to providing that agreements for cooperation must contain a requirement for IAEA safeguards or their equivalent, section 123(a)(1) only requires "safeguards as set forth in the agreement."

Prior to its amendment by the NNPA in 1978, the AEA required that agreements for cooperation include "a guarantee by the cooperating party that security safeguards and standards as set forth in the agreement for cooperation will be maintained."[10] The practice under this provision since 1954 makes clear that safeguards "as set forth in the agreement" varied widely from no safeguards at all, to safeguards primarily implemented by the cooperating party, to elaborate bilateral safeguards provisions with detailed U.S. inspection rights.

Three agreements for peaceful nuclear cooperation concluded under the language of the 1954 Act contained no safeguards at all in the sense of inspection rights or material accountancy. The agreement for cooperation with the United Kingdom merely contained the following provision:

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[10] Section 123(a)(2), Public Law 83-703, 68 Stat. 919.

> "All classified material, equipment, devices and classified information exchanged under this Agreement shall be safeguarded with applicable security arrangements between the Commission and the Authority.[11]

The agreement with Canada merely provided that:

> The security safeguards and standards prescribed by the security arrangements by the Commission and the Atomic Energy Agency Control Board of Canada in effect on June 15, 1955, will be maintained with respect to all classified information and materials, including equipment and devices exchanged under this Agreement.[12]

The agreement with Belgium contained a similar provision.[13]

A whole series of other agreements had different "safeguards" provisions. Articles VI and VII(A) of the U.S. agreement with Greece may be taken as an example:

> Article VI
>
> A. The Government of the Kingdom of Greece agrees to maintain such safeguards as are necessary to assure that the uranium enriched in the isotope U-235 leased from the Commission shall be used solely for the purposes agreed in accordance with this Agreement and to assure the safekeeping of this material.

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[11] Article IX(A), Agreement for Cooperation on the Civil Uses of Atomic Energy Between the United States and the United Kingdom of Great Britain and Northern Ireland, June 15, 1955, 6 U.S.T. 2709, T.I.A.S. No. 3321.

[12] Article XII(A), Agreement for Cooperation Concerning Civil Uses of Atomic Energy Between the United States and Canada, June 15, 1955, 6 U.S.T. 2595, T.I.A.S. No. 3304.

[13] Article XI(A), Agreement for Cooperation Concerning the Civil Uses of Atomic Energy Between the United States and Belgium, June 15, 1955, 6 U.S.T. 2551, T.I.A.S. No. 3301.

> B. The Government of the Kingdom of Greece agrees to maintain such safeguards as are necessary to assure that all other reactor materials, including equipment and devices, purchased in the United States under this Agreement by the Government of the Kingdom of Greece or authorized persons under its jurisdiction shall be used soley for the design, construction, and operation of research reactors which the Government of the Kingdom of Greece decides to construct and operate and for research in connection therewith, except as may otherwise be agreed.
>
> C. In regard to research reactors constructed pursuant to this Agreement the Government of the Kingdom of Greece agrees to maintain records relating to power levels of operation and burn-up of reactor fuels and to make annual reports to the Commission on these subjects. If the Commission requests, the Government of the Kingdom of Greece will permit Commission representatives to observe from time to time the condition and use of any leased material and to observe the performance of the reactor in which the material is used.
>
> Article VII
>
> Guaranties Prescribed by the United States
> Atomic Energy Act of 1954
>
> The Government of the Kingdom of Greece guarantees that:
>
> A. Safeguards provided in Article VI shall be maintained.
>
> * * * [14]

These provisions show that the primary responsibility for the maintenance of safeguards was given not to an international agency or to the United States, but to Greece, the recipient government. If the AEC requested, Greece agreed to permit Commission representatives "to observe from time to time the condition and use" of leased material. These provisions, including safeguards maintained by the recipient and occasional visits by the United States, are characterized as "safeguards" in Article VII(A). Similar provisions were included in agreements with Argentina, Austria, Brazil, Chile, Colombia, Costa Rica, Cuba, Denmark, the Dominican Republic, the Federal Republic of Germany, Guatemala, Indonesia, Iran, Israel, Italy, Japan, Korea, Lebanon, New Zealand, Pakistan, Panama, Peru, the Philippines, Portugal, Spain, Sweden, Thailand, Turkey, Uruguay, Venezuela, Vietnam and West Berlin.[15/] In each of these agreements, the provisions in question are called "safeguards" in the agreement itself.

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[14] Agreement for Cooperation Between the United States and Greece Concering Civil Uses of Atomic Energy, August 4, 1955, 6 U.S.T. 2635, T.I.A.S. No. 3310.

Other agreements concluded during the same period contained what would now be considered more traditional bilateral

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[15/] Background Material for the Review of the International Atomic Policies and Programs of the United States, Report to the Joint Committee on Atomic Energy, Congress of the United States, Vol. 2, Joint Committee print, 86th Cong., 2d Sess., October 1960, at 432-34; article VIII, IX(a), Agreement for Cooperation Between the United States and Indonesia Concerning Civil Uses of Atomic Energy, June 8, 1960, 11 U.S.T. 2024, T.I.A.S. No. 4557; article VIII, IX(a), Agreement for Cooperation Between the United States and Panama Concerning Civil Uses of Atomic Energy, June 24, 1959, 14 U.S.T. 876, T.I.A.S. No. 5370. See, e.g., article VI, VII(A), Agreement for Cooperation Between the United States and Israel Concerning Civil Uses of Atomic Energy, July 12, 1955, 6 U.S.T. 2641, T.I.A.S. No. 3311, safeguards provisions. Thus, for example, the 1956 agreement for cooperation between the United States and France contained traditional bilateral safeguards provisions including design review, records requirements and inspection rights.[16/] In Article XI(A) these provisions are also called "safeguards".[17/] By 1960, there were 13 agreements in effect with this type of safeguards provision.[18/]

From the foregoing it is evident that the clause "as set forth in the agreement" was interpreted to give U.S. negotiators broad discretion to vary the safeguards provisions in agreements for peaceful nuclear cooperation as was deemed appropriate to the circumstances. Some agreements had no safeguards in the sense of material accountancy and inspection. Some had recipient-applied safeguards, and others had bilateral U.S. safeguards. All were included in U.S. agreements for cooperation in satisfaction of the same

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[16/] Article X(A), Agreement for Cooperation Between the United States and France Concerning Civil Uses of Atomic Energy, June 19, 1956, 7 U.S.T. 3097, T.I.A.S. No. 3689.

[17/] Agreement for Cooperation Between the United States and France Concerning Civil Uses of Atomic Energy, June 19, 1956, 7 U.S.T. 3097, T.I.A.S. No. 3689.

[18/] Background Material for the Review of International Atomic Policies and Programs of the United States, Report to the Joint Committee on Atomic Energy, Congress of the United States, Vol. 2, Joint Committee print, 86th Cong., 2d Sess., October 1960, at 466.

paragraph of the AEA and all were referred to as "safeguards" in a generic sense.

There is no evidence in the history of the 1954 Atomic Energy Act to suggest that Congress intended in any way to limit the discretion of the negotiators or to assign a special meaning to "safeguards".

When the AEA was amended in 1978 by the NNPA, the clause "security safeguards and standards" was replaced by the shorter reference "safeguards". This simplification was due to the fact that the term "safeguards" had become accepted for reference to the provisions adopted since 1954 in fulfillment of the requirement of the 1954 act. There is no indication in the legislative history that this change was intended to be substantive. The Senate report on the NNPA merely indicates, in referring to the preexisting text: "The existing provision simply requires that 'security safeguards and standards as set forth in the agreement will be maintained.'" The report does not focus on the change in language to the word "safeguards", but rather on the addition of the requirement that safeguards be maintained "so long as the items remain under the jurisdiction or control of the cooperating party, irrespective of the duration of other provisions in the agreement or whether the agreement is terminated or suspended for any reason."[19] Further, the crucial point is that the modifying phrase "as set forth in the agreement" was retained, bringing with it the historical flexibility that had been available to vary the "safeguards" provisions as appropriate for each agreement.

The language of the proposed agreement for cooperation between the United States and China is similar to the language of the agreement for cooperation with Greece quoted above and other similar agreements in the sense that the Greek agreement depended on the cooperating party to account for the material provided by the United States and envisaged visits by United States officials from time to time. The language in the proposed U.S.-China agreement goes far beyond that in the agreements the U.S. had with the U.K., Canada and Belgium, which had no requirements for material accounting, containment and surveillance or inspections. Each of those agreements were sufficient for the purposes of U.S. law and the proposed agreement with China clearly meets the provisions of U.S. law as well. None of these provisions is equivalent to IAEA safeguards and none is equivalent to fall-back bilateral safeguards found in current agreements with non-nuclear-weapon states. Such equivalency is clearly not required, as has been demonstrated by the foregoing review of the statutory text and the U.S. practice in the field.

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[19] Senate Report No. 95-467, 95th Cong., 1st Sess., October 3, 1977, at 21-22. The Senate report relates to the final version of the bill subsequently enacted as the NNPA. The House Report in describing all the changes being made to section 123 of the Atomic Energy Act, focuses on the new requirement for the duration of safeguards and says "this is one of the significant additions to section 123." In describing the new provision, the House Report indicates that it pertains to "safeguards required under the agreement." In describing the purpose of the change, the House Report indicates that it will ensure the continuation of IAEA safeguards even if the U.S. terminates exports or the agreement expires. House Report No. 95-587, 95th Cong., 1st Sess., August 5, 1977, at 11-12. The reference to IAEA safeguards is merely illustrative and does not alter the fact that the plain statutory language is more general. The focus of the Congress was on ensuring the perpetuity of safeguards, not on redefining the meaning of "safeguards" in section 123(a)(1).

The proposed agreement with China contains provisions that assure that nuclear material, facilities and components supplied by the United States will not be misused. In addition to articles 8(2) and 5(2), which are discussed in this memorandum, there are commitments that these items will not be used for any military or explosive purpose, will not be retransferred without U.S. consent, and will be subject to agreed levels of physical security. All these provisions will continue in effect as long as the item in question remains in China, even if the agreement itself expires. Moreover, the agreement expressly excludes cooperation in sensitive technologies, nor does it in any way require that technology of military or strategic significance be transferred. While it provides a framework for potential U.S. nuclear export, it does not commit the U.S. to export any item. Taken together, these provisions establish a regime for nuclear cooperation that is suitably stringent and appropriate for reciprocal dealing with a nuclear-weapon state.

Reprocessing and Other Fuel Cycle Activities

Section 123(a)(7) and (8) of the AEA, as amended by the NNPA, 42 U.S.C. 2153(a)(7) and (8), require that an agreement for cooperation include:

> (7) except in the case of agreements for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c., a guaranty by the cooperating party that no material transferred pursuant to the agreement for cooperation and no material used in or produced through the use of any material, production facility, or utilization facility transferred pursuant to the agreement for cooperation will be reprocessed, enriched or (in the case of plutonium, uranium 233, or uranium enriched to greater than twenty percent in the isotope 235, or other nuclear materials which have been irradiated) otherwise altered in form or content without the prior approval of the United States;
>
> (8) except in the case of agreements for cooperation arranged pursuant to subsection 91 c., 144 b., or 144 c., a guaranty by the cooperating party that no plutonium, no uranium 233, and no uranium enriched to greater than twenty percent in the isotope 235, transferred pursuant to the agreement for cooperation, or recovered from any source or special nuclear material so transferred or from any source or special nuclear material used in any production facility or utilization facility transferred pursuant to the agreement for cooperation, will be stored in any facility that has not been approved in advance by the United States....

In compliance with these provisions, the proposed agreement between the United States and China contains the following provisions in article 5(2):

> Neither party has any plans to enrich to twenty percent or greater, reprocess, or alter in form or content material transferred pursuant to this agreement or material used in or produced through the use of any material or facility so transferred. Neither party has any plans to change locations for storage of plutonium, uranium 233 (except as contained in irradiated fuel elements), or high enriched uranium transferred pursuant to this agreement or used in or produced through the use of any material or facility so transferred. In the event that a party would like at some future time to undertake such activities, the parties will promptly hold consultations to agree on a mutually acceptable arrangement. The parties undertake the obligation to consider such activities favorably, and agree to provide pertinent information on the plans during the consultations. Inasmuch as any such activities will be solely for peaceful purposes and will be in accordance with the provisions of this agreement, the parties will consult immediately and will seek agreement within six months on long-term arrangements for such activities. In the spirit of cooperation the parties agree not to act within that period of time. If such an arrangement is not agreed upon within that period of time, the parties will promptly consult for the purpose of agreeing on measures which they consider to be consistent with the provisions of the agreement in order to undertake such activities on an interim basis. The parties agree to refrain from actions which either party believes would prejudge the long-term arrangements for undertaking such activities or adversely affect cooperation under this agreement. The parties agree that the consultations referred to above will be carried out promptly and mutual agreement reached in a manner to avoid hampering, delay or undue interference in their respective nuclear programs. Neither party will seek to gain commercial advantage. Nothing in this article shall be used by either party to inhibit the legitimate development and exploitation of nuclear energy for peaceful purposes in accordance with this agreement.

Under this provision, reprocessing, enrichment, alteration in form or content and (for weapons usable material) storage of materials subject to the agreement cannot be undertaken without the prior agreement of the United States. When one party wishes to undertake any of these activities, the parties undertake to consult immediately for the purpose of "agree[ing] on a mutually acceptable" long-term arrangement; since such an arrangement cannot be concluded before the U.S. agrees, the U.S. has a right of prior approval with respect to the long-term arrangement. The U.S. and China will try to reach agreement in six months; during that time, they agree that neither party will undertake any of the activities in question. Thus, during this period, none of these activities can take place without U.S. prior approval. If agreement is not reached on long-term arrangements within the six-month period, the parties will promptly consult "for the purpose of agreeing on measures . . . [to permit these] activities on an interim basis." The activities may not be undertaken without the interim measures and those measures must be agreed to by both parties. Until there has been such agreement, the parties are obligated to "refrain from actions which either party believes would prejudge the long-term arrangements or adversely affect cooperation under the agreement." There can be no doubt that if China proceeded without the agreement of the United States, this would adversely affect cooperation under the agreement. Thus, after the initial six month period, the fuel cycle activities in question still cannot occur without agreement on interim "measures", and the U.S. has a right to withhold its agreement to any activity that is proposed.

It was clearly understood by both parties that such activities could not occur without U.S. agreement. During the negotiations, both China and the U.S. recognized that the issue of implementing these consent rights would not arise in any practical sense for substantially more than a decade. The Chinese, however, were concerned.that the standard formulation of the consent right provision originally proposed by the U.S. would give the U.S. the ability to control the evolution of the future domestic Chinese nuclear program by mere failure to respond to any approval request they might make. The resulting text obviates that risk.

In sum, none of the activities may be undertaken, at any time, unless the United States first agrees -- the United States is assured the right to approve or disapprove before any of the specified activities is undertaken. The AEA requires that the United States Government have the right to approve of these activities before any of them is undertaken. That is precisely what article 5(2) provides for, thus satisfying the requirements of U.S. law.

Questions have been raised, however, as to whether article 5(2) is sufficiently clear and unambiguous to meet the U.S. legal requirements and about language which relates to the manner in which the parties will implement article 5(2).

Paragraphs (7) and (8) of section 123(a) do not dictate the precise language that must be used in an agreement. That language is subject to negotiation. What counts is that the substantive requirements of the law are met. The language of article 5(2) ensures that the United States may exercise an approval right before the activity in question is carried out. The obligation to "seek agreement . . . on long-term arrangements" is not an obligation to agree. Similarly, the prohibition on unilateral actions which "prejudge the long-term arrangements . . . or adversely affect cooperation" assures that China may not conduct any of the activities in question until and unless the U.S. has given its consent. The U.S. is given discretion to decide what interim activity would "adversely affect cooperation" -- no agreement is required on this point, and our decisions are thus not subject to argument; this phrase is sufficiently broad to include any non-proliferation or national security concern that the U.S. believes could adversely affect cooperation. Together, these provisions establish a framework of prior U.S. approvals which is what the law requires. Since the agreement text ensures that the activities in question may not be undertaken without the prior approval of the United States, it is sufficient to meet the requirement of law, even though the language is not the same as in previous agreements.

In pre-1978 agreements, a variety of different formulae were used to establish a U.S. reprocessing consent right, and all were recognized by Congress as meeting the export requirement established by the NNPA in section 127(5), 42 U.S.C. 2156(5), for a prohibition on reprocessing "unless the prior approval of the United States is obtained." For example, some agreements required that reprocessing be performed in facilities of the cooperating party only upon a joint determination of the parties that the provisions of the article pertaining to safeguards could be effectively applied, or in other facilities as mutually agreed between the parties.20/

20/ Article IX(E), Agreement for Cooperation Between the United States and Argentina Concerning Civil Uses of Atomic Energy, June 25, 1969, 20 U.S.T. 2587, T.I.A.S. No. 6721; article VIII(F), Agreement for Cooperation Between the United States and Brazil Concerning Civil Uses of Atomic Energy, July 17, 1972, 23 U.S.T. 2477, T.I.A.S. No. 7439; article VIII(F), Agreement for Cooperation Between the United States and Finland Concerning Civil Uses of Atomic Energy, April 8, 1970, 21 U.S.T. 1368, T.I.A.S. No. 6896; article II(E), Agreement for Cooperation Between the United States and India Concerning Civil Uses of Atomic Energy, August 8, 1963, 14 U.S.T. 1484, T.I.A.S. No. 5446; article VIII(C), Agreement for Cooperation Between the United States and Japan Concerning Civil Uses of Atomic Energy, February 26, 1968, 19 U.S.T. 5214, T.I.A.S. No. 6517, amended, 23 U.S.T. 275, T.I.A.S. No. 7306, and 23 U.S.T. 2323, T.I.A.S. No. 7758.

Another group of agreements required that any such reprocessing be performed at the discretion of the AEC in either AEC facilities or facilities acceptable to the AEC on terms and conditions to be later agreed.[21] Yet another group of agreements provided that the reprocessing could be performed in facilities acceptable to both parties upon a joint determination of the parties that the safeguards provisions of the agreement could be effectively applied.[22] The Senate report on the NNPA recognized that "although the actual language in our existing agreements for cooperation varies, and seldom corresponds precisely to the language of these criteria, it is our understanding that each of these basic requirements and rights are contained [except in the U.S. cooperation agreements with the IAEA and EURATOM]."[23] Thus, Congress recognized that agreement language does not have to be the same

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21/ See, e.g., article VIII(H), Agreement for Cooperation Between the United States and Norway Concerning Civil Uses of Atomic Energy, May 4, 1967, 18 U.S.T. 531, T.I.A.S. No. 6260, amended, 21 U.S.T. 817, T.I.A.S. No. 6849; article IX(F), Agreement for Cooperation Between the United States and the Philippines Concerning Civil Uses of Atomic Energy, June 13, 1968, 19 U.S.T. 5389, T.I.A.S. No. 6522.

22/ See, e.g., article IX(C), Agreement for Cooperation Between the United States and Austria Concerning Peaceful Uses of Atomic Energy, July 11, 1969, 21 U.S.T. 10, T.I.A.S. No. 6815, amended, 25 U.S.T. 2337, T.I.A.S. No. 7912; article VIII(C), Agreement for Cooperation Between the United States and Spain Concerning Civil Uses of Atomic Energy, March 20, 1974, 25 U.S.T. 1063, T.I.A.S. No. 7841.

23/ Senate Report 95-467, 95th Cong., 1st Sess., October 3, 1977, at 16.

as the U.S. statutory language, but rather has to carry forward its substance. Exports have been licensed by the Nuclear Regulatory Commission based on the findings by it and the Executive Branch that various formulations in preexisting agreements all met the statutory requirement for a consent right.

Undeniably, the Congress wanted the U.S. reprocessing approval right to be unqualified and set forth in the agreement unambiguously.[24/] However, it is also clear that the Congress recognized that the provisions in question had to be negotiated with foreign governments and that the language would neither always follow the statutory language nor always be the same. Moreover, in terms of legal sufficiency, the Congress, the Executive Branch and the Nuclear Regulatory Commission have found consent rights to exist in cases where some might argue they are less than clear and unqualified. To be sure, the language in the China agreement is different from that in other agreements. However, since the substantive effect of the provision that has been negotiated is to ensure that the activities in question cannot be carried out unless the United States approves in advance, the requirements in section 123(a)(7) and (8) are met.

24/ House Report 95-587, 95th Cong., 1st Sess., August 5, 1977, at 14.

The foregoing conclusion is not altered by the language in article 5(2) relating to the manner in which decisions on reprocessing and other fuel cycle activities are reached. Article 5(2) provides that the parties "undertake the obligation to consider such activities favorably." This in no way mandates the result of that consideration. It merely recognizes that the United States and China have no predisposition to prevent all reprocessing, alteration, enrichment, and storage. The text makes clear that pertinent information on the proposed activities will be provided and that the parties will consult for the purpose of agreeing on the arrangements. The United States has the ultimate ability to decide whether or not to agree. The Executive Branch of the United States Government is bound to follow the legal standards in the AEA and NNPA and policy applicable at the time of a request in deciding on whether or not it is in a position to agree.

Article 5(2) further provides that consultations on long term and interim arrangements will be "carried out promptly and mutual agreement reached in a manner to avoid hampering, delay, or undue interference in their respective nuclear programs." This does not compel the United States to agree to any proposed particular arrangement. Obviously, the United States has no intention of interfering in the Chinese domestic civil nuclear program. The clause recognizes that the United States would have no say with regard to matters not subject to the agreement for cooperation. It is based on an IAEA document,[25/] and has appeared in a variety of formulations in most of our peaceful nuclear cooperation agreements since 1978.[26/] The clause does not undercut the explicit requirements for agreement on arrangements (whether long-term or interim) and does not release either party from its obligation not to act unilaterally.

Article 5(2) contains a further clause indicating that neither party will seek to gain commercial advantage. This clause was included to make clear that the United States would not refuse to agree, for example, to enrichment, reprocessing, or storage in China for the purpose of gaining commercial advantages for companies that were engaging in that activity in

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[25/] See paragraph 4, The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/153 (corrected), June 1972, at 2. Similar language is included in IAEA safeguards agreements.

[26/] See articles 7(5), 9(6), Agreement for Cooperation Between the United States and Egypt Concerning Peaceful Uses of Nuclear Energy, June 29, 1981, - U.S.T. - , T.I.A.S. No. 10208; articles 7(5), 9(7), Agreement for Cooperation Between the United States and Peru Concerning Peaceful Uses of Nuclear Energy, June 26, 1980, - U.S.T. - , T.I.A.S. No. 10300; articles 7(5), 9(7), Agreement for Cooperation Between the United States and Morocco Concerning Peaceful Uses of Nuclear Energy, May 30, 1980, - U.S.T. - , T.I.A.S. No. 10018. In Congressional consideration of post-1978 agreements for peaceful nuclear cooperation, no question has ever been raised about the inclusion of this clause.

the U.S. and competing for international business. Rather, the U.S. includes consent rights in nuclear cooperation agreements for non-proliferation and national security purposes and that is how they would be administered. The clause in no way undercuts the U.S. prior approval right. Further, it should be noted that such a clause has been included in a U.S. agreement for cooperation subsequent to the NNPA and has not evoked any criticism.[27]

The last sentence in paragraph 2 of article 5 provides that nothing in the article shall be used to inhibit the legitimate development and exploitation of nuclear energy for peaceful purposes in accordance with the agreement.[28] This provision cannot be construed to require that the United States agree to any particular proposed Chinese nuclear activity. The phrase "in accordance with this agreement" makes clear that the agreement's explicit requirements for agreement on long-term arrangements or interim measures apply and that neither party is released from its obligation not to act unilaterally. Instead, the sentence indicates that the intention of each party is not to administer the article with the purpose of inhibiting the other's domestic development and exploitation of nuclear energy for peaceful purposes. The U.S. would be expected to administer the provision for the purpose of promoting its non-proliferation and security objectives.

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[27] See paragraph 12, Agreed Minute, Agreement for Cooperation Between the United States and Egypt Concerning Peaceful Uses of Nuclear Energy, June 29, 1981, - U.S.T. - , T.I.A.S. No. 10208.

[28] In article IV(1) of the Treaty on the Non-Proliferation of Nuclear Weapons the United States recognized the right of states to develop research, production and use of nuclear energy for peaceful purposes in conformity with appropriate non-proliferation undertakings. July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839.

Conclusion

In summary, therefore, the objections that have been raised to the proposed peaceful nuclear cooperation agreement between the United States and China relating to its legal sufficiency under section 123(a) of the Atomic Energy Act are without merit. The agreement has been carefully reviewed by all concerned agencies and all have concluded that the agreement meets all requirements of law.

The CHAIRMAN. Thank you very much, Mr. Matheson.

Mr. Matheson, some Members of the Senate have expressed concern about that section of the agreement which provides U.S. law enacted subsequent to this agreement may not override it.

What is your response to this concern?

Mr. MATHESON. Mr. Chairman, I believe you are referring to a provision in article 2 of the agreement, and that provision merely restates a principle of international law that is universally recognized which appears in the Vienna Convention on the Law of Treaties and which, in fact, is applicable not only to this agreement but to all other of our agreements for cooperation.

It states simply that if a state incurs international obligations, it cannot escape them by changing its own domestic law.

That principle, of course, is very much in the interest of the United States and particularly in the area of nuclear cooperation agreements. We certainly would not want to accept that one of the recipients of our nuclear materials could evade its international obligations, for example, with respect to peaceful use, nonretransfer, and so on, simply by amending its own domestic law.

So that is a very important principle from our own point of view.

Now, of course, within the U.S. domestic constitutional system, the executive branch will, in fact, comply with any requirements enacted by a constitutionally valid statute subsequent to the time an agreement is entered into force, even if it would require the United States to be in breach of an international obligation. But with respect to this particular agreement, I should point out that the United States has no obligation to supply or to make exports of nuclear materials to China. So, therefore, if we should find it necessary or desirable to modify our export criteria with respect to future exports at any time, we can do so without violating the obligations we have incurred under this agreement.

In effect, we have the best of both possible worlds. We retain flexibility to deal with our own export criteria, and yet, we are insuring that the obligations that China is undertaking with respect to the various guarantees are maintained regardless of what they have in their domestic system.

The CHAIRMAN. As a followup to that, Senator Proxmire in his testimony this morning indicated that a treaty requires consideration by this committee hearings and a two-thirds majority of the Senate for ratification. This agreement obviously does not.

Are you drawing a parallel between this agreement as an item of international law and a treaty which has different requirements for its ratification?

Mr. MATHESON. Sir, the use of the word "treaty" both in this provision and in the Vienna Convention is meant to include all international agreements conveying international obligations. The distinction in the U.S. constitutional system between a treaty, which requires the advice and consent of the Senate and other international agreements is not at issue here. So, when this provision says "treaty," when international law says "treaty," it includes this agreement as well as formal treaties.

The CHAIRMAN. I appreciate that assertion. I suppose I am attempting to draw some comfort for those who would find that this type of agreement should not be given the same weight as a treaty;

that this is essentially what it purports to be, an agreement. The executive branch of Government has come to an agreement, and I suppose the Senate and House have an opportunity to disapprove it, but that is a different type of approval, of a negative sort.

Perhaps, as you say, under international law there is no difference between the two procedures; but, if so, this gives rise to some concern by members as to the degree of examination and confirmation that is required.

Mr. MATHESON. Well, there are differences, of course, in the U.S. domestic system between treaties and other forms of agreement. But as you just mentioned, under international law, the obligations have the same effect. That is important to us here because we want to have the obligations which China assumes with respect to nonuse and retransfer and so on, to have the highest status under international law and to be fully binding obligations.

So, it is one thing to deal with the domestic procedures by which agreements or treaties are entered into or reviewed; but it is another thing when you get to the international side to make sure that these are fully binding obligations.

The CHAIRMAN. I have a technical question that arises from memos the committee has received. We have indeed received two different legal memos which state that the U.S. right to consent to reprocessing required by section 123(*A*) of the Atomic Energy Act of 1954, as amended by the Nuclear Nonproliferation Act of 1978, must be, "unqualified," and set forth in an agreement "unambiguously." These conditions of the U.S. right of consent are not contained in the statute, but in the House report on the Nonproliferation Act.

As a matter of law, is language in the House report on a bill to be given the force of law?

Mr. MATHESON. Well, I think language in the reports of either House can be useful in illustrating the intention of Congress and can be helpful in guiding the executive branch in implementation the provision. Of course, one example of that is my recollection of the Senate report on the same bill which, in fact, reiterated that many different forms of language might be used to obtain the consent rights required by the statute, and it was not the precise form of the language, but the substance, which counted.

Having said that, I will say that I think this provision of the agreement is, in fact, unambiguous and it is unqualified. In particular, the agreement contemplates if China or for that matter the United States wished to consider the reprocessing of material provided under the agreement, there would be a 6-month period during which there could be consultations and discussions to see whether long-term agreement between both parties was possible. And the agreement specifically says that the parties agree not to act within that period of time.

Then, after that 6-month period, if agreement has still not been found, the agreement specifically states that the parties agree to refrain from actions which either party believes would prejudge the long-term arrangements for undertaking such activities or adversely affect cooperation under this agreement. This clearly states that if the United States believes that the reprocessing or other activity proposed would be inconsistent with long-term arrangements or adversely affect cooperation, then the activity may not be undertaken. This is a judgment which is reserved to the United States. If we believe that that is the case, then China may not engage in the activity.

That, sir, seems to me very clear, and I don't know how I could say it clearer.

The **CHAIRMAN**. Let me ask this question of any member of the panel.

Since the Nonproliferation Treaty entered into force, U.S. agreements have been with NPT signatories, or countries which accepted IAEA safeguards. France and Britain are bound by EURATOM standards.

Is this the first agreement since the NPT which does not contain some kind of safeguards?

Ambassador **KENNEDY**. I think that is not accurate, Senator. Indeed, there have been such agreements.

I would point out, by the way, that, of course, France is not an NPT signator, though the United Kingdom is.

The **CHAIRMAN**. France is bound by the EURATOM standards.

Ambassador **KENNEDY**. That is correct.

But initial agreements that had been created did not provide for safeguards. They have been adjusted since.

The **CHAIRMAN**. In other words, there have been agreements entered into since the NPT came into force that did not have safeguards?

Ambassador **KENNEDY**. No, there have not. That's correct. There have not been such.

The **CHAIRMAN**. This would be the first, then?

Ambassador **KENNEDY**. That's right. But it is also the first agreement bilaterally with a nuclear weapons state.

The **CHAIRMAN**. When administration witnesses have contended that the People's Republic of China is providing for IAEA safeguards with other countries, does this mean only for new relationships, or will the People's Republic of China seek safeguards for ongoing nuclear trade?

Ambassador **KENNEDY**. If we are concerned about will they, in a sense, grandfather older agreements, the answser is we think not. We think their statements have been rather all-encompassing, and we see no evidence that they are engaging in any trade now that is not safeguarded.

The **CHAIRMAN**. Mr. Albright, you mentioned that Exim could arrange private sector loans for nuclear sales. How likely is this, as a matter of fact?

Mr. **ALBRIGHT**. Well, Mr. Chairman, if Exim were going to try to arrange the whole loan from a private source, there are limited numbers of sources who can really provide funds out over 23 years. However, there are some that can, including in the United States. Technically there is the Private Export Funding Corporation [Pefco], which we could guarantee and which could provide that type of funding.

However, in addition, under the OECD sector agreement, there is a split option for financing included which says that the buyer can have a choice. He can either take all the funding, say, from Eximbank, 100 percent of the financing—in other words, 85 percent of the export—at the fixed rate we would offer, or he can take half the financing at our fixed rate at the outset and agree for the other half to take private financing. We could provide a guarantee, for the private lender. The borrower would be making a judgment, in effect, that they think interest rates are moving in the right direction and they are prepared to ride the market. With a guarantee committed from the outset, they would place the money in the private sector for half the financing halfway through the project.

So there are some options here which could provide for partial financing from the private sector in the project, or in limited circumstances perhaps the entire lot. But placement opportunities would be limited in that second category.

The CHAIRMAN. Granted that the United States may not be favored with all, or even a majority, of the sales that have been contemplated, some very large numbers have been a part of the testimony. Is it within the capacity of Exim to arrange either private or public or combined financing for billions of dollars of sales of nuclear power plants over a 2- to 3-year period of time to the Peoples' Republic of China?

Mr. ALBRIGHT. Well, Mr. Chairman, I think I noted that it is still unclear at what pace they are going to proceed. I think there are a number of variables. It is hard to predict exactly how much will be needed at what time.

As I indicated, even if they proceeded with five plants, I think there have been estimates that, depending on the pace at which they can build their domestic capacity, over a 5-year period it might only be something like between $4 or $5 billion of exports, and that would not all be required in 1 year.

So, you could be looking at $800 million a year perhaps in commitments for even a 5-year program of 10,000 megawatts.

Admittedly, the first plants, could have a significant impact on the budget because they involve possible amounts in the billion dollar or billion-and-a-half of export value in the initial plant. As I indicated, if we were able to use our guarantee authority, if the interests rates were at the proper level, then we could cut in half what we would have to do on that amount.

So I think it is very much a phased program in China. We do not see it excessively impacting in 1 year, and, depending on interest rates, we might be able to do even part of that in the private sector.

The CHAIRMAN. Let me raise this question and I suspect, Ambassador Kennedy, you might try this one.

If the People's Republic of China were to sign the Nuclear Nonproliferation Treaty, what restraints would it be accepting which are different from the current situation?

Ambassador KENNEDY. Well, it would undertake a number of obligations which the treaty actually requires. But I would say, Mr. Chairman, that in most respects, it is already undertaking precisely those obligations.

When it undertakes to comply with safeguards or to make a voluntary offer of safeguards, it has done the same thing that the other nuclear weapons states have done. When it undertakes to apply safeguards to all of its exports, it has gone farther, indeed, than the treaty would suggest it would need to do.

The only thing I think principally that it might add that comes to mind is that it would by joining the treaty, commit itself to things like article 6, which require the nuclear weapon states to undertake to reduce nuclear arsenals, and article 4, where the states are required to undertake to assist others in peaceful nuclear cooperation.

But, of course, it is already undertaking that.

It also, of course, would undertake an obligation to seek to encourage all states to undertake an NPT obligation.

But in terms of the strict nonproliferation concerns which we have, most of the obligations which would be involved have already been undertaken.

The CHAIRMAN. Why have they not simply just signed the treaty?

Ambassador KENNEDY. As Senator McClure says, they respond to this admonition which, by the way, we raise with them on a regular basis with a kind of boilerplate answer, to wit, that it is discriminatory and that it discriminates between the nuclear weapon states and the nonnuclear weapon states by allowing the nuclear weapon states to continue to hold their nuclear arsenals, albeit that article 6 requires them to substantially reduce those arsenals. They believe, they claim, that that is a clear case of discrimination against the nonnuclear weapon states which undertook obligations not to acquire them while the nuclear weapon states did not undertake a reciprocal commitment to actually immediately reduce them.

So one state, they say, can't have them, and continues to uphold that, whereas the others are supposed to get rid of them and do not.

I would note, by the way, that France has not acceded to the NPT either.

The CHAIRMAN. Gentlemen, I thank you very much for your statements. They will be made a part of the record in full. We appreciate your responses to the committee's questions.

Ambassador KENNEDY. Thank you very much, Mr. Chairman.

The CHAIRMAN. The Chair will now recognize the final panel consisting of Prof. John Copper, Stanley J. Buckman distinguished professor of international studies, Rhodes College, Memphis, TN; Mr. Paul Leventhal, president of the Nuclear Control Institute; Mr. Edward C. Luck, president of the United Nations Association; and Mr. Charles N. Van Doren.

Senator CRANSTON. Mr. Chairman, may I make a brief statement before we hear from the next panel?

The CHAIRMAN. Yes, indeed.

Senator Cranston is recognized to make a statement while you gentlemen are coming to the witness table.

Senator CRANSTON. I appreciate your courtesy in giving me this opportunity.

As you know, I have been stuck over on the floor in the middle of the budget considerations there.

I really wanted to make a request of you, if I may.

I have been following what has been happening here, although I have not been present. I was deeply dissatisfied with some of the answers in yesterday's classified session. I know other members, Democrats and Republicans, were concerned also by some of the answers given to us in that closed session.

There are concerns that there may be a politicization of intelligence data. I don't know that that is the case, but there is some reason to be concerned about the twisting, suppressing, or covering up of information by the executive branch.

I make no charges to that effect, yet. I am just concerned about what we have been hearing that could indicate that that is occurring.

If we cannot rely on the administration, if Members of Congress cannot rely upon what the intelligence agencies provide, then we have to have questions about the policies upon which many decisions are made. These policies have to be based upon sound intelligence.

I think we, as a committee, have to be as aware as we can be of what is happening in this respect. Plainly, intelligence data do not belong to the administration. It is a resource that we have to depend upon, too, and when we have classified sessions and other meetings with representatives of the intelligence community, we have to be satisfied that we are getting the facts to the best of the ability of intelligence gatherers to find and present those facts to us.

We have a responsibility and an obligation to be fully and currently informed on these key issues, and that means being informed by the CIA and not just the State Department.

I am not sure always whether we know that we are getting the full story from the intelligence agencies when they come to us secondhand.

So I would like to make a request to you, Mr. Chairman, on my own behalf and on behalf of several colleagues on both sides, I might say, of the aisle and the political spectrum.

I think we need a prompt and direct briefing from the CIA and specifically from the analysts who have been tracking recent Chinese nuclear export practices. So, if you could make that request on behalf of the full committee and arrange for that to occur, I would be very grateful, and I think it would be helpful to us as we make our own decisions on these matters.

The CHAIRMAN. Let me respond to the Senator, and I will carefully think about it and converse privately with the Senator about it. Let me just say that a request was made, and in this particular instance, the Central Intelligence Agency asked to provide the information to the Foreign Relations Committee through two members of the committee who are also members of the Intelligence Committee. Those two members, Senator Murkowski and Senator Eagleton, were given briefings.

Beyond that, I felt because of the importance of the situation that I should make a further appeal and I did so. Senator Pell and I then were briefed by the persons that are involved.

It is the right of each Senator individually under Senate Resolution 400, as I recall, to have available to him or to her all information, and so I could arrange and would be happy to arrange a briefing for the Senator or for any individual Senator. But the request was made by the agency, and I think with reasonable grounds, that they would prefer that these briefings were one on one or through the liaison process because of the sensitivity of the data and the sources and methods that are involved.

The Senator can obtain the information. I will try to expedite that. Any member of the committee can be briefed simply by law and the rules of the Senate. We have been careful because of the gravity of the issues, and I would hope the Senator would understand that.

Senator CRANSTON. I thank you for that response.

Let me say, however, that I, of course, know that I am entitled to all sorts of briefings. I think they would be more productive if several members were together and I think the whole committee, so that we can learn from each other in terms of the questions that each of us chooses to ask, and learn from the responses what followup questions are necessary. I feel that such a session would be more productive for many of us and I think probably for all of us if we did it together rather than one on one separately.

I don't see any reason relating to security for doing it one on one. Questions asked and answered in a group can be held just as securely as questions asked and answered one on one.

The CHAIRMAN. That could well be the case. I suspect the attempt on the part of the agency is to confine to the smallest number of people who have a need to know, and that, as a rule, private meetings such as the one we had yesterday involve persons in addition to Senators.

Let me just say that I think it is useful to have this conversation in the open so that everybody is aware that we are concerned. I think we will just have to try to reason through what is feasible so that all Senators have information and so that all Senators feel they have had a chance to converse with other Senators so that we have as fruitful a product as possible.

Senator CRANSTON. Why don't we discuss the matter further.

The CHAIRMAN. Very well.

Senator CRANSTON. I want to apologize to the panel that is now present and to those who preceded you for my inability to stay because we are involved in a minicrisis in the Government and we have to make sure that we are able to pay our bills tomorrow and the next day.

Thank you for your presence and your interest in a very, very important matter that is of great concern to me also.

Thank you.

The CHAIRMAN. Thank you very much, Senator Cranston.

The Chair would like to recognize panelists in the order that persons were called. First is Professor Copper, then Mr. Leventhal, Mr. Luck, and Mr. Van Doren, in that order.

Gentlemen, as you have already observed, we would ask, if possible, that you have summary statements of 5 to 10 minutes. We will ask questions of each of you, if we may.

Professor, would you please proceed.

STATEMENT OF JOHN F. COPPER, STANLEY J. BUCKMAN DISTINGUISHED PROFESSOR OF INTERNATIONAL STUDIES, RHODES COLLEGE, MEMPHIS, TN

Mr. COPPER. Thank you, Mr. Chairman. I want to thank the committee for giving me the opportunity to appear here and say something on this important issue.

I want to make six points regarding the issue of nuclear technology transfer to the People's Republic of China.

They are: First, the foreign policy record of the People's Republic of China; second, the problem of domestic instability that China has experienced; third, China's record in telling the truth and keeping agreements; fourth, China's record on nuclear proliferation; fifth, China's human rights record; and last, the financial help that we have given China and what kind of bargaining position we should be in in dealing with this issue.

My conclusion is we ask for something more from Chinese leaders than has been given, namely only a verbal promise, regarding the use of nuclear technology which will go to the People's Republic of China.

First, regarding Chinese foreign policy, let me say that if you look at Chinese foreign policy over the past 30-some years, you see that every decade their policy changes very markedly. It was pro-Soviet and anti-United States for the first 10 years. It was anti-Soviet and anti-United States both for the next 10. Then it was pro-United States during the 1970's. In the 1980's, China's foreign policy has become what China scholars call an "equidistance"—between the United States and the Soviet Union—policy.

I think if you look for a trend in Chinese foreign policy at the present time, you will see China is now leaning toward the Soviet Union. Clearly, it is not one of improving relations, relatively, with the United States, although relations are generally very good.

There are issues of disagreement: Grenada, for example, U.S. Central American policy, the Middle East, South Africa, Poland. We have disagreed with the People's Republic of China on all of these issues.

In short, what I would like to say is that China's foreign policy has changed very markedly several times in the past three or four decades, and looking at that, we would anticipate changes in the future which are not necessarily in our national interest. In other words, we really do not have a good idea based on the past where China is going in terms of its foreign policy.

We can say the same thing about Chinese domestic policy. That has changed very dramatically over the last several decades. When the present regime came to power in 1949, it launched a purge of landlords and other "class enemies." There was a program to institutionalize communes in the mid-1950's during the Great Leap Forward. There was the Cultural Revolution in the mid-1960's, and we saw many leaders come and go—purged—during that period.

As a result of the Great Leap Forward, Mao himself said that he was ignored in terms of decisionmaking. He said at one point that he felt when attending party meetings it was like he was at his own funeral. In 1965, when he launched the Cultural Revolution, it was an endeavor to win power back. But, of course, and now the regime is admitting this, millions were persecuted and many lost their lives during that time as a result.

The present government also exhibits signs of instability. Deng Xiaoping has launched what he calls the "Second Revolution." Things are changing very markedly in China as we all know. Some of it is positive change. But clearly it is a change, and there can be repercussions from that. Some of them we know about.

Crime has become a serious problem in China. Deng has launched what was called an "Anti-Spiritual Pollution Campaign" in 1983, which was clearly anti-Western in its flavor. Deng said 2 years ago that he would reestablish ranks in the military. He has not done that. Clearly there is opposition to the present regime. Most scholars feel that if Deng were to die tomorrow, there would be something like a 50–50 chance of his reforms lasting.

Third, I think we need to say something about China's record in telling the truth in keeping agreements.

When the Great Leap Forward was launched in the mid-1950's, China spoke of a 40-percent increase in the grain harvest, which was soon followed by a serious famine in China and thousands of people fled the country. We then learned that the 40-percent increase in grain production was not true.

During the Cultural Revolution we heard about the Dazhoi Commune, a model commune. Later we learned that that was a fraud.

We know of China's claims about its leaders' infalibility. We hear of their mistakes when they are subsequently purged.

Currently we hear from Deng Xiaoping that there are peasants who are making enough money to buy cars, even airplanes. Foreign reporters go to interview these peasants, but they cannot find them.

Beijing Review recently proclaimed that China has $8 billion in foreign investment. The Department of Commerce says it is $1 to $2 billion.

In 1982, we signed an agreement with the People's Republic of China, subsequently called "Shanghai Communique II." Chinese leaders promised a "peaceful solution only" to the Taiwan question in return for the United States decreasing weapons sales to Taiwan and ultimately ending those sales. The next day after the agreement was made, official representatives of the People's Republic of China said they had made no such promise.

Recently, on the Hong Kong issue, Chinese leaders said that People's Liberation Army personnel would not be stationed in Hong Kong after 1997. They then switched their position on that also.

In short, their reputation in terms of saying things that are true and keeping agreements is not very good.

Fourth, moving specifically to the nuclear technology transfer issue and nuclear proliferation, China's record similarity does not inspire confidence. In fact, China is the only country to advocate nuclear proliferation. It did so in the 1950's and 1960's. Moreover, in the mid-1960's, China offered Indonesia a nuclear explosion, and presumably the technology data that would go along with that. Since then, there have been rumors that China has sold enriched uranium to South Africa. We don't know whether that is true or not, but they have, in fact, denied it, but they have also denied trade with South Africa, and we know that that has been going on.

There are also rumors China has sold nuclear technology to Argentina, and more serious rumors of transfers to Iraq, Iran, and Pakistan.

In the case of Iraq, China is selling sophisticated fighter, jet fighter, aircraft and tanks to that country. And in the case of Pakistan, China clearly has an interest in making sure that India does not become the dominant power on the subcontinent, and they have clearly said that.

In other words, China is the only country in the world that has really been of concern regarding nuclear proliferation. The People's Republic of China has not signed the Nuclear Nonproliferation Treaty, 129 nations of the world community have signed that agreement.

The fifth point I would like to make concerns human rights in China, an issue which generally affects United States foreign policy toward various nations.

Regarding human rights, it is very clear, I think, if you regard one human soul or one human life to be equal to another, then China has the worst human rights record of any country in the world.

Putting it in more relative terms, you have heard that there are a million, perhaps 2 million political prisoners in the Soviet Union's gulags. Estimates regarding China's gulags go to 20 million and more. Soviet dissident groups claim there are thousands of intellectuals and minority groups that have been killed or put into labor camps in the Soviet Union. Tibetan groups in the United States claim that 1.2 million Tibetans have been killed or have died of unnatural causes since the People's Republic of China invaded Tibet. Thousands have been executed, and hundreds of thousands have died in labor camps. Nearly 100,000 have died of torture, according to the Tibetan groups in the United States.

Of course, this could be exaggerated, but the Chinese themselves admit that there are tens of thousands of political prisoners in a number of provinces in China.

On the abortion issue, China has also given us some figures that go into the millions of abortions, many of them taking place during the seventh, eighth, and ninth months. In some cases when a child is born, it is hit on the head with a hammer and killed and that is called an abortion.

In some parts of China there are 40 percent more male children than female children because of infanticide resulting from the forced abortion policy.

China does have a population problem. But is this necessary? Taiwan has nine times the population density of China, no natural resources and very little arable land, and there are no forced abortions there.

Likewise for Japan—it has three times the population density of China.

I think the forced abortion policy goes along with both a mistake in the past in encouraging a large population and it coincides with other movements and efforts to keep the party in control.

The sixth point I would like to make, and I will finish up very briefly, is that China has been the recipient of considerable help economically from the United States. The United States is China's third largest trading partner. If we consider the transshipment of goods through Hong Kong, the United States would be the second largest trading partner of the People's Republic of China.

China buys computers, electronics, aircraft, communications equipment, and other high tech products, most of which they could not buy elsewhere, at least at the same quality and the same price. We are buying textiles, boar bristles, feathers, handicrafts and so forth, things which we could easily buy somewhere else. In fact, many Third World countries complain that we are buying too much from China and that that is hurting their economic development.

We have put China in the category of an ally in terms of high technology purchases. Last year, of high technology licenses issued for the sale of high technology items to Communist countries, China got 75 percent of them.

China has received $2 to $3 billion in loans from international financial institutions. We pay 25 percent of the budget of most of these agencies.

A good share of the loans are at zero rate interest—concessionary loans, and 80 to 90 percent of the loan is grant.

There are 10,000 students from China studying in the United States, mostly financed in part or totally now. There are very few American students studying in China.

This being the case, I think the United States is in a strong position to make demands that China give better guarantees on the issue of nuclear technology transfer than they have.

I might add that one reason China is so interested in nuclear technology right now is its oil production has not kept pace with its economic development. Recently there were high hopes for offshore drilling, in which U.S. companies have been involved. Thirteen American companies have been helping with offshore oil drilling. However, optimistic predictions about offshore oil have not come true. Thus China needs nuclear power badly.

That concludes what I have to say.

Thank you.

[Mr. Copper's prepared statement follows:]

PREPARED STATEMENT OF JOHN F. COOPER

In late October the United States government will allow the transfer of nuclear technology and equipment for building nuclear power plants to the People's Republic of China unless the Senate and the House of Representatives act to block this agreement signed by the Secretary of Energy on July 23.

I wish to comment on several factors that relate to the approval of the agreement or the conditions under which it is approved. They are: (1) The People's Republic of China foreign policy, (2) The PRC's domestic political situation, (3) Beijing's record in telling the truth and keeping its word on foreign policy agreements, (4) China's record on nuclear proliferation, (5) the PRC human's rights record, and (6) the help--financial and otherwise--the U.S. has given the People's Republic of China and what position our government in making demands of the Chinese government.

First, if synopsized in a few words, the PRC's foreign policy has changed direction every ten years. It was anti-United States during the 1950s. In 1960 Beijing split with the Kremlin and its foreign policy during the 1960s was both anti-U.S. and anti-Soviet. During the 1970s it became pro-U.S. and remained anti-Soviet. In the 1980s it has returned to an "equi-distance" policy between the two superpowers; sometimes it is called a pro-U.S. and pro-Soviet policy or a non-aligned policy.

During the time it was anti-American the PRC engaged the United States in war twice: once in Korea where it sent a million "volunteer" soldiers to fight and kill U.S. and United Nations troops. In Vietnam it sent somewhere in the vicinity of 50,000 troops, and, according to its own accounting, between 14 and 18 billion dollars in aid to Hanoi--to facilitate the defeat of the Republic of Vietnam and American "imperialist forces" helping that government.

During the first decade of its anti-American policy Chinese leaders espoused the position that nuclear weapons were "paper tigers." Mao on several occasions said that China could engage in nuclear war and lose three hundred million people and still win. He elaborated on the statement saying callously that China has lost half of its population several times before and was able to repopulate quickly.

During the 1960s the PRC had the reputation of being the most anti-status quo and the most disturbing to international stability of any nation in the world--by providing military aid (including offering nuclear weapons) to Third World countries, by almost indiscriminately aiding guerrilla and insurgency groups, and by encouraging nations to withdraw from the United Nations. In the latter half of this decade China became the most isolated of any major or second level power--with only one ambassador at his post in 1969. This resulted from internal disturbances that affected China's foreign relations vis-a-vis virtually every country in the world. It resulted in the PRC's ignoring international diplomatic law and causing injury and death to foreign diplomats formally invited to China, breaking into foreign embassies, etc.

In the 1970s Beijing aligned with the United States in what it termed a "united front" (the U.S., the PRC, Western Europe and Japan) against Soviet "aggression." The PRC responded to Moscow's vast military building up and what Chinese leaders perceived was an effort to "surround and contain" China. The PRC, following its united front strategy, encouraged Japan to rearm (a position it had never taken before), admonished Western European governments to maintain strong military forces and make no concessions to the Soviet Union on arms control, and pressured the United States to take a tough stance against the Soviet Union--in some cases suggesting that the United States act in such a way that would risk war with the U.S.S.R.

This policy did not succeed in matching the PRC's expectations. As a consequence Chinese leaders adopted a policy of playing one superpower against the other--a policy that became official at the 12th Party Congress (of the Chinese Communist Party) in 1982. During the 1980s efforts to better relations with the Soviet Union have characterized Chinese foreign policy--even though the Kremlin has made no concessions on issues the Chinese said they had to in order for Sino-Soviet relations to improve (removal of some of the over 50 divisions of Soviet troops on the Soviet-Chinese border, discontinuing support of Vietnam making possible its occupation of Kampuchea, and the Soviet military occupation of Afghanistan).

Meanwhile, China has condemned the U.S. invasion of Grenada, has criticized U.S. policy in Central America, the Middle East, South Africa and has refused to support Washington's sanctions against Poland (and has helped undermine these policies by granting economic aid to Poland). China has also given large quantities of military assistance to Iran, and has aided the PLO and other terrorist groups in the Middle East and Africa.

The Chinese press and even Chinese leaders refer to the United States as an "imperialist" country, though their pejorative terms are used somewhat more frequently toward the Soviet Union--inasmuch as the United States is doing much more to help China's economic modernization that the Soviet Union is.

In short, China's foreign policy record over the past three and one-half decades reflects periodic and extreme shifts in lines, during which friends are transformed into enemies and enemies into friends. There is no reason to believe that this pattern will not continue, thus determining the PRC's relations with the United States to change drastically in the future. In fact, several situations may cause this to happen: An effort by Beijing to forcibly take Taiwan would certainly evoke U.S. interference. Domestic unrest in China caused by ill-feelings toward those benefitting from capitalism and business and other ties with the West could evoke a change in foreign policy line. Protectionist or less generous policies by the United States toward the PRC, thus limiting U.S. economic help to the PRC, could change Chinese leaders' attitudes toward the U.S.

Second, a look at China's domestic politics reveals cause for concern that the PRC is not a stable country and that the U.S. has little reason to believe that nuclear technology could in China's case be transferred and its use be predicted with a high degree of certainty.

When the present regime assumed political power in 1949, it launched a new economic development plan and a purge of landlords and other class enemies. By the mid-1950s it was clear that the economic plan was not suitable to sustain high growth. Thus Chinese leaders decided on a path of radical communism--communes and an end to capitalist production and private ownership. Meanwhile the government had exterminated or imprisoned tens of millions of people that it defined as "class enemies."

In the late 1950s the communes failed and as a result millions starved or suffered from malnutrition. Millions more fled the country. Mao was blamed for the failure of the "Great Leap Forward," as it was called, and was removed from the position of head of state of the People's Republic of China. He was subsequently ignored (by his own admission it was like attending his own funeral) and decisions were made by other factions of the Chinese Communist Party.

In 1965, by allying with Defense Minister Lin Biao and promising him eventual leadership of the Party, Mao was able to launch the Great Proletarian Cultural Revolution. Mao used college and high school students, who received personal instructions from him, to revolt and remove "capitalist roaders" from the Party and government. They literally destroyed both, and killed, injured or persecuted millions of people in the process--especially those opposed to Mao's policies, government and Party officials, and the educated class. Those who were not indoctrinated Maoists became enemies.

The military, which at first supported Mao under Lin's leadership and admonishments, finally could not stand the radical and destructive actions of the "Red Guards" who followed Mao's dictums. Thus civil disobedience escalated into what amounted to civil war as the radical leftists confronted the People's Liberation Army. The river flowing into Hong Kong was frequently red from blood during this period. It was also rumored the Red Guards had threatened the nuclear sites in Northwestern China at which time the local military commander broke communications with Beijing and advised Mao to call off the Red Guards or he might use nuclear weapons against Beijing.

During this time hundreds and thousands of China's top leaders were purged--including the PRC's present de facto leader or strongman Deng Xiaoping. The decision making process was paralyzed to the point that communications were broken with many foreign nations and foreign diplomats were forced to lead Maoist demonstrations wherever they were stationed whereby upon they were expelled or jailed.

When Mao died in 1976 he was replaced by Hua Guofeng--the head of security forces responsible for protecting Mao, or Mao's personal body guard. In power, Hua turned against Mao's other supporters including Mao's wife and a purge of the "gang of four" followed, affecting leftists in the Party, government, and the military.

Deng then launched what he called China's "second revolution"--a free market, capitalist incentives, foreign investment, rapid growth policies, etc. This evoked strong anti-Deng opposition among middle and lower level bureaucrats--especially leftists and Maoists--in the Party and government and in the military. As a result of those changes their power and prestige declined. Some say that because of opposition from the military Deng ordered the attack on Vietnam in 1979. Chinese forces didn't fare very well against seasoned Vietnamese "irregulars" (and tens of thousands were killed)--as Deng wanted and predicted because he sought to embarrass and weaken the political influence of the military.

Deng's radical (for China) policies have evoked repercussions. Crime has become a serious problem in China, for which Deng is held blame-worthy. There is still strong opposition to Deng's policies (and foreign policy issues, especially the Taiwan issue, are rallying points against Deng because his support comes primarily from the grassroots and on economic issues). In 1983, apparently to calm the opposition, Deng was compelled to launch a xenophobic "Anti-Spiritual Pollution Campaign."

Deng has continued to push his policies even at considerable risk of fomenting widespread opposition. He has put many of his people in positions of authority. Yet has has not accomplished many of the things he said were policy goals--such as reestablishing ranks in the military. He is now over eighty years old and there is little confidence among China's scholars that he has appointed enough of his followers to positions of power that they may be able to continue his policies should he die in the next year or two. Many put the probability at fifty-fifty (inasmuch as Maoists and other opponents of Deng are simply waiting for his demise to make their move).

Third, when considering China's request for nuclear technology and the sales of nuclear power plants based on statements or promises by Chinese leaders to the effect that they will not transfer this technology to their countries, we need to examine their record to date in telling the truth.

During the Great Leap Forward the PRC government daily reported on the success of the new economic development plan and enthusiastic public support. Later we learned that one of the reasons the "Leap" failed was widespread sabotage and feather-bedding and the passive protest of peasants to these extreme communist policies. In 1958 the government reported that the size of the harvest increased that year by 40 percent. We later learned, when thousands were fleeing from China into Hong Kong because of starvation conditions on the mainland, that the 40 percent increase claimed earlier was a lie.

During the Cultural Revolution "learn from Dazhai" (commune) haw a slogan heard daily. Dazhai was a model of cooperative work spirit and superhuman efforts to conquer nature stimulated by Mao's teachings. Later it was revealed that Dazhai was a fraud.

During the Cultural Revolution Liu Shaoqi, who was removed from the position of head-of-state of the PRC and was labelled a scab, a traitor and many worse things. He died in prison. Before that he had been Mao's heir apparent and was referred to as the greatest thinker next to Mao in China. He was the author of a book that was required reading for Party members--How to be a good Communist. Lin Biao then became Mao's heir. It was written into China's new constitution in 1969 that Lin would succeed Mao as head of the Chinese Communist Party. Later it was reported by the Chinese media that Lin had attempted to assassinate Mao and when that plot failed he tried to flee to the Soviet Union. His plane was shot down or crashed in route and Lin died.

After Mao's death Hua Guofeng assumed Mao's position and purged other close associates of Mao, his wife included. He then blamed the purged "Gang of Four" and their followers for everything that went wrong in China--as Lin and Liu had been blamed before. Later a dissident, in a public speaking contest, spoke of production increasing 10 percent as a result of Mao's latest instruction, criticism of Lin Biao, the purge of the "Gang of Four" and now the study of recent Party documents, satirizing the "truthfulness" of the government controlled press in the PRC.

Recently Deng Xiaoping has boasted of peasants earning enough money to buy cars and even airplanes. High profits from new inventions, innovative cat and fish farms have also been brandished by the media. But when foreign reports seek out the people who have made these accomplishments they are not able to find them.

Several years ago the PRC signed a number of multimillion dollar commercial contracts with Japan to purchase steel plants and materials, machinery and help in building other large projects in China. Subsequently the orders were cancelled without paying compensation to Japanese companies that had already invested heavily and spent considerable sums to start on the projects. Little explanation was given for the cancellations. Similarly American merchants have been given assurances--in writing--on the repatriation of profits, only to find these assurances meaningless. Contracts have been broken or fulfilled only partially with regularity.

Several months ago--apparently in order to demonstrate China's reliability and attractiveness for foreign investors--the PRC publicly proclaimed (in Beijing Review--an international publication) that foreign investment in China had reached $8 billion. The U.S. Department of Commerce subsequently said the figure was in the range of $1 to $2 billion--the former being a gross exaggeration.

The PRC's record is similar regarding treaties and agreements with foreign countries. In 1950 Beijing signed a thirty year treaty of friendship and alliance with the Soviet Union. While the treaty was still in force Chinese leaders stated publicly that it "wasn't worth the paper it was written on." Chinese leaders have also referred to their erstwhile ally (formerly called "elder brother") as an "imperialist" and has compared the Soviet leadership to Hitler, calling it avaricious, greedy and aggressive.

Beijing, during the 1950s and 60s, referred to its relationship with Vietnam as "as close as the teeth and the lips." The PRC promised Vietnam all of the military assistance it could use in fighting the American "imperialist aggressors" and on numerous occasions offered Chinese soldiers to help fight during the war. In 1979, to teach Hanoi a "lesson", China sent its army into Vietnam igniting a war between the two countries. Since then Beijing has referred to Vietnam as "Asia's Cuba," a "stage of the Kremlin" and worse.

In 1982, Beijing and Washington negotiated "Shanghai Communique II" in which the PRC promised a "peaceful solution only" to the "Taiwan Question" in return for a U.S. promise to reduce arms sales to Taiwan and eventually end these sales (even though they were guaranteed in the Taiwan Relations Act--legislation established by an overwhelming vote in the U.S. Congress). The next day Chinese leaders declared they had made no such promise. They have subsequently continued to say they made no such agreement, yet demand that the U.S. keep its commitment to reduce and end arms sales to Taiwan (for nothing in return we must assume).

Last year the PRC and England came to an agreement on the future status of Hong Kong--based on two years of secret talks and agreements kept from the people of Hong Kong, while leaking certain information to weaken the British negotiating position.

During the negotiations Beijing promised that the Chinese People's Liberation Army would not be stationed in Hong Kong. Later the PRC reneged on this promise.

Fourth, China's record regarding the transfer of nuclear technology, or nuclear proliferation, is not good. In fact, the PRC is a singular case in this regard.

In the 1950s PRC leaders contended that it was bad for the superpowers to have a "nuclear monopoly". Beijing, in fact, advocated that more countries should have nuclear weapons, especially Third World nations. China's own nuclear weapons program assumed the correctness of these policies.

In the early 1960s, as the PRC developed its own nuclear weapons (which it tested in 1964), it was widely reported that Beijing promised Indonesia "nuclear status" by agreeing to test one of its nuclear weapons there and pass on the information on the test to the Indonesian government. China tensibly wanted to facilitate the communist movement in Indonesia by providing it with military help (even nuclear) that might engender tension with neighboring countries. However, this hope evaporated when the Communist Party of Indonesia failed in an attempted coup in the fall of 1965 after which the Indonesian Army suppressed the communist movement and the new government broke relations with Beijing.

Since then it has been widely rumored that the PRC has sold enriched uranium to South Africa. Beijing has denied this rumor;

but Chinese leaders have also denied trade with South Africa--which is well documented.

Beijing has also reportedly sold Argentina heavy water and has provided the Argentine government with other technology necessary to make nuclear weapons.

More recently China has been accused of supplying weapons-grade uranium to Iraq. After Israel destroyed its nuclear facilities, China was cited in various quarters as one of the nations that would help Iraq continue on the way to nuclear status. China has and is selling Iraq other weapons, including tanks and fighter planes, totalling to several billion dollars.

The PRC has for many years been suspected of helping Pakistan develop nuclear capabilities. Beijing has provided significant quantities of military aid to Pakistan since 1964--the same year that China made its initial test of a nuclear weapon. Its aid to Pakistan has included guerrilla training, jet fighter planes, tanks, patrol boats, munitions factories and military roads (in disputed territory). Beijing has also reportedly stationed troops in Pakistan and has provided the Pakistan military with ground to air missiles.

The Nuclear Regulatory Agency, the Central Intelligence Agency and the Indian Government have all stated that the PRC has helped, and probably still continues to help Pakistan build an "Islamic bomb" by providing know how regarding enrichment techniques and possibly much more.

It is in China's interest that Pakistan become a nuclear power in view of the PRC's goal of maintaining a balance of power on the Indian sub-continent to prevent India from Becoming the dominant nation it the area (which has been facilitated by its military defeat of Pakistan in 1971 and its attaining nuclear status in 1974) and China's competition with India for leadership of the Third World (facilitated by India's disputes with Pakistan and other neighboring nations and New Delhi's reliance upon the Soviet Union for weapons).

Reports about China's transferring nuclear knowhow to other countries, and thus fostering nuclear proliferation, should not only be seen in the context of Chinese statements favoring the end of the superpower monopoly in nuclear weapons and its own nuclear weapons allegedly built for that purpose. The PRC has also rejected the Nuclear Non-proliferation Treaty and has consistently refused to become a signatory of that document--a document supported by the United Nations and signed by 129 nations of the world community. It has given no indication that it will ever sign this document or that it favors other nations either signing it or abiding by it.

It does not then seem unusual--though it does appear portentous--that the PRC refuses to put specific promises or guarantees to the effect that it will not allow the spread of nuclear weapons technology or provide any other nation, or guerrilla or terrorist organization, with the technology supplied by the United States much less any acquired on its own, in writing.

Fifth, something should be said about the human rights condition in China in relation to this agreement. Like any important foreign policy agreement the U.S. makes with a nation that has a serious rights problem, human rights abuses and the government's attitude toward human rights should be considered.

Very little has been said about the human rights record of the People's Republic of China in the context of Sino-American relations, albeit few would deny that a greater number of people have suffered from human rights deprivations and abuses in China than any nation in the world. Even on a per capita basis China's human rights record is deplorable.

The U.S. has been extremely critical of political prisoners in the Soviet Union's "Gulag." Estimates sometimes go as high an one to two million. Estimates of the number of political prisoners in China's "Gulag" (actually there are a number of them) go as high as 20 million or more (even though China's population is only four times that of the Soviet Union).

Soviet dissident groups have reported that thousands of intellectuals and minority groups have been killed or put in labor camps. Tibetan groups in the U.S. report 1.2 million Tibetans--one fourth of their population--have died of unnatural causes since the PRC invaded Tibet in 1950. They report more than one hundred and fifty thousand have been executed, nearly two hundred thousand have died in prison or labor camps and nearly one hundred thousand have died of torture. The only like situation is Hitler's Germany and Pol Pot's Cambodia.

The PRC's abortion policy (53 million from 1979-84 according to Time magazine) has resulted in the destroying of millions of fetuses of pregnant mothers often in their 7th to 9th month of pregnancy. Some estimate that 90 percent of the abortion in China are the result of coercion. Frequently mothers in the late stages of pregnancy are allowed to go into labor and when the child's head appears it is hit with a hammer and the process is called an abortion. Party cadres keep records on all women's periods who are of child bearing age in complete disregard of any right of privacy. However, Party cadres are themselves frequently exempted from population control policies.

The one-child policy has resulted in widespread infanticide of female babies (resulting in up to 40% more male children than females in some areas) and the practice of killing girl children (even teenagers) so that a family can have a male child to help with the farm work and carry on the family name.

This situation prevails in spite of the fact that China's population density is one-ninth of Taiwan's and the latter has virtually no natural resources and only a small portion of its land is arable (yet has no forced abortions). Likewise with Japan--that is three times as densely populated as China and has no resources and little land that can be cultivated. It does not have policy of forced abortions.

China's population control program is not just arbitrary. Its "need" stems from the fact that the Party made a mistake in encouraging large families in the past. It also reflects the leadership's need to retain tight social control: it wants to demonstrate that it has policies, so reverses the policy rather than simply dropping it.

In the fall of 1983, the government of the PRC launched an anti-crime campaign--which is still going on. Reducing crime meant using capital punishment (sometimes in public and in violation of the Constitution) to intimidate would-be criminals. But it was also aimed at those demanding greater freedoms and rights: Democracy Wall had just been closed and many civil rights cancelled. Twenty nine crimes are listed as capital crimes, including many that are not dealt with by execution in most other countries--such as rape, embezzlement and "hooliganism." Due process is seldom followed and after brief and usually staged judicial procedures, the accused is shot in the back of the head at close range. According to foreign reporters, the number of people executed to date is around 20,000, but may be much more.

Clearly the human rights condition in the PRC has not improved in recent years. The Security Police have been given added powers so that they have both police and intelligence functions (like the KGB). The Chinese government has argued that political human rights are "bourgeoisie" rights and that economic rights are more important. Chinese leaders emphasize equality of incomes. Yet the disparity of incomes in the PRC is greater than in the capitalist countries of Asia, and has increased in recent years. The number of PRC diplomats, scholars and businessmen seeking political asylum in the United States has increased markedly in recent years and probably exceeds in number any other nation (resulting in at least one case of a diplomat who sought asylum in the U.S. being killed).

Sixth, the PRC is a major benefactor of American economic help. That being the case the United States should be, and is, in a strong bargaining position to ask for written guarantees regarding the transfer of technology. And for special reasons that will be mentioned below this is even more true of nuclear technology. Or, if the nuclear technology transfer agreement is rejected it would not be expected to damage U.S.-China relations.

The United States is the PRC's third largest trading partner (after Japan and Hong Kong). In reality the U.S. is number two, since a large part of China's exports to Hong Kong are transshipped to other countries--primarily the United States. Moreover, China has a favorable balance of trade with the United States (in a rather sizeable fashion if Hong Kong transshippment are included). U.S. trade provides China with desperately needed foreign exchange that is a sine qua non for the success of Deng's "Four Modernizations."

The PRC buys from the United States computers, electronics, aircraft, communication equipment, and other high technology products (including dual use--military and civilian), patents and weapons. Few of these thing can be purchased anywhere else, or at least not of the quality and for the same price. Many of the high-tech items that Beijing might try to purchase elsewhere it would not be able to if it were not for good U.S.-China relations and U.S. permission (given to foreign countries which have used American technology that carry restrictions on their export to communist countries).

The United States purchases from the PRC textiles, boar bristles, feathers, handicrafts and such items. All of these import items are available elsewhere. In fact, other developing countries complain of U.S. purchases from China hurting their exports and thus hampering their economic development plans. None of the items purchases from the PRC are strategically important to the United States. All are purchases under Most Favored Nation status (usually not granted to communist countries) and many are imported under Generalized System of Preferences (lower tariffs granted to developing nations to facilitate their economic growth).

In November 1983 the PRC was put in the same category as U.S. "allies" to purchase technology and high-tech goods in the United States whose export is restricted by law. That same year Beijing requested 65 items; it was granted 32. In 1984 China accounted for 75 percent of the high-tech expert licenses to communist nations. The People's Republic of China has received between $2 and $3 billion in concessionary loans from the World Bank, the United Nations and other international lending organizations. Most of the loans from the World Bank are from the related organization, the International Development Agency, which grants loans for 50 years with a 10 year grace period and at a zero rate of interest.

These loans are 80 to 90% grant (depending upon the rate of inflation). The United States pays approximately one-fourth of the budgets of these organizations. Washington has encouraged such loans to China (except for population control programs because of the prevalence of forced abortions in China). On the other hand, Washington has discouraged and blocked such loans from going to other nations, such as Vietnam.

There are over 10,000 students from the PRC studying in the United States at the present time. 80 percent of these are receiving tuition payments or other financial assistance through government or private scholarships in this country. There are only a few American students in China actually studying or doing research--almost none in the sciences or social sciences either because there is nothing there to study or because excessive interference and non-cooperation by government officials makes meaningful research impossible.

American private investment in China exceeds one billion dollars--much of which is in offshore oil drilling. Thirteen American companies are involved in exploratory drilling off the coast of China. In view of the fact that China's on-shore oil production has dropped in recent years and its energy demands have increased markedly with faster economic development, off-shore oil production is very important to China. But little has happened to date that would give cause for optimism. Rather just the opposite.

This being the case nuclear power is very important. And, because the U.S. has the best technology and equipment to develop nuclear energy, Chinese leaders have approached the U.S. for help. Going elsewhere has a number of disadvantages: U.S. companies who are not helping China would not feel so generous if this happened; the balance of trade would become a more serious problem (in view of the fact China is no longer importing large quantities of U.S. grain and cotton); European and Japanese companies are bound by agreements with the U.S. regarding the export of nuclear technology and could not easily supply the PRC with similar technology.

In short, China's modernization is highly dependent upon U.S. economic generosity. The PRC's economic growth would slow down markedly if its economic development plans could not be realized in their present form. This cannot happen without U.S. trade, investment and other economic help. Should economic growth falter, the present regime might well be ousted.

In summation the United States is considering the transfer of nuclear technology and the sales of nuclear power plants and equipment to a nation whose foreign policy has demonstrated a great deal of change and even caprice. Clearly Beijing is not a U.S. ally and behaves like one only when it is in its own interests. In a number of instances since "normalization" (in 1978), it has behaved in a way very much at odds with U.S. global interests. The PRC is often seen as offsetting Soviet military power in Asia. Yet China's military forces and its defense budget have both been cut in recent years. In any event China ties down ground forces, which are not of much relevance to the U.S. or even other countries of Asia. Japan helps tie down Soviet naval and air forces--and can be expected to more and more in the future.

The PRC's domestic political situation has manifested extreme change and instability since the communist regime came to power in 1949. Currently there is considerable opposition to the present leadership--which depends upon one man who is over 80 years old and who has fallen from power twice in recent years because of his outspokenness, daring and extreme policies.

The transfer of nuclear technology and plants is being based on vague promises by the Chinese leadership that they will not transfer it to another country. Yet the record of the leadership in Beijing for telling the truth or keeping its promises is not good--in either its public statements or in its official agreements with other countries. In short, telling the truth or keeping agreements is not important in its way of conducting business, diplomatic or otherwise.

China is the only nation in the world to have advocated nuclear proliferation and acted accordingly. No other nation has even been accused of transferring nuclear knowhow or helping another nation build a nuclear weapon. The PRC has. And this is not just history.

The United States generally considers a nation's human rights record when doing business with that nation or when considering aid or other help to give to that nation. If this were made a criterion in dealing with the PRC, certainly this deal--not to mention many others--would have to be scrapped. The PRC's human rights record is the worst in the international community if all humans are considered equal and thus the number of humans whose rights are deprived or abused is the standard. By any other standard the PRC's human rights is gross.

Finally, the U.S. is in a position to make demands from the PRC. China very much needs the U.S. economically; the U.S. does not need China at all (and would have better relations with other developing nations if it were to terminate the economic help it is granting the PRC and give it to other poor countries--most of which are better friends or allies).

The agreement on nuclear technology transfers and the sales of nuclear plants and/or equipment will provide the PRC with vast quantities of plutonium that can be used for making weapons or that can be transferred to other countries to make nuclear bombs and thus contributes to nuclear proliferation--which the U.S. has consistently opposed for decades. Most other nations also oppose proliferation.

Hence the Congress should make several demands: that the PRC sign the Nuclear Non-Proliferation Agreement, that it give written guarantees (better than it has given to date) to the United States regarding the use of American technology and equipment, that it allow periodic inspections by the U.S. to assure that the agreement is being kept, and that it agrees to settle disputes in Asia peacefully (specifically a renunciation of force in resolving the "Taiwan issue"). Beijing's response to these requests should influence the Congress to approve or block this agreement.

The **Chairman**. Thank you very much, Professor.

Mr. Leventhal.

STATEMENT OF PAUL LEVENTHAL, PRESIDENT, NUCLEAR CONTROL INSTITUTE, ACCOMPANIED BY ELDON GREENBERG, COUNSEL, NUCLEAR CONTROL INSTITUTE

Mr. **Leventhal**. Mr. Chairman, thank you very much.

I am Paul Leventhal, president of the Nuclear Control Institute, which is a Washington-based nonprofit research organization that deals with problems of nuclear proliferation.

I am accompanied today by our counsel, Eldon Greenberg, who assisted in the preparation of this testimony and would be pleased to respond to any questions you might have dealing with the legal aspects of the agreement.

The Chairman. Thank you.

Mr. **Leventhal**. Daniel Horner of our staff also participated in the preparation of this testimony.

I will summarize the highlights and will try to avoid the points that have been made by others.

I wish very much that I could testify that the agreement is sound and well crafted. Such an agreement would be most desirable. It would meet the requirements of U.S. nonproliferation law and would further the law's objectives at a critical time and in cooperation with a critically important nation. It would also help to insure continued improvement in the complex relationship between the United States and China, establishing the basis for shared nonproliferation values in particular.

Unfortunately, the agreement in its present form is seriously flawed and undermines the administration's own stated objectives. It violates U.S. legal requirements and formalizes fundamental policy disagreements between the two nations.

We believe it is a recipe for trouble, serious trouble, both for United States efforts generally to curb the spread of nuclear weapons and for future United States relations with China in particular.

The fundamental problem with the agreement can be found in the executive branch memorandum to the President, and I quote: "Entry into force of this agreement," stated the Secretaries of State and Energy, "will provide a framework for a continuation of our discussions on nonproliferation matters with the Chinese."

Yet, I would ask, after 4½ years of negotiation, why doesn't the agreement represent a culmination of nonproliferation discussions with the Chinese? If it does not, there must be some important reasons as to why not, and I would suggest that a little digging into the provisions reveals some substantial agreements to disagree between the two nations.

We feel it is essential that the committee give high priority to addressing this problem in the time remaining for congressional consideration of the agreement. As you know, the recently enacted Proxmire amendment, which was enacted with the then-forthcoming United States-China agreement in mind, does provide the committee the opportunity to request of the President that the agreement be withdrawn and resubmitted with a waiver of the pertinent statutory requirements.

The Nuclear Control Institute supports this procedure, which was enacted earlier, as I indicated, with the United States-China agreement in mind. We are joined in this position by three other organizations, the Union of Concerned Scientists, the Natural Resources Defense Council and the Sierra Club. Our position was summarized in a letter that was sent to you, Mr. Chairman, on September 10, and I have attached to my prepared testimony this letter and the two accompanying legal memoranda dated September 9 and September 20, which were prepared for us by Mr. Greenberg. I ask that these be included in the hearing record.

The **Chairman**. Without objection, they will be included.

Mr. **Leventhal**. Thank you.

I would also ask that a recent article in the New York Times by Peter Claussen of the Union of Concerned Scientists, who is a former intelligence officer, as well as an article that I wrote about a year ago in the Washington Post dealing with the agreement also be accepted for the record.

The **Chairman**. Without objection, they will be included in the record.

Mr. **Leventhal**. Thank you.

As we stated in the letter, we believe that the agreement violates fundamental requirements of U.S. nonproliferation law. We are concerned that it threatens to erode U.S. nonproliferation policy as well as congressional prerogatives in overseeing that policy and may well invite future diplomatic disputes with China. While we appreciate that there is strong support for this agreement within Congress as a means of further solidifying U.S. relations with China, this agreement might well spell serious harm to the bilateral relations and to the credibility of our nonproliferation policy.

In particular, we would point to the United States-India Tarapur agreement, which was motivated very much by the same incentives as this agreement with China, but became perhaps the single greatest obstacle to harmonious relations.

The China agreement, like the Tarapur one, contains what are essentially agreements to disagree on such critical matters as application of safeguards and use of transferred materials.

The committee might seek to plug loopholes in the agreement by means of binding language in a separate joint resolution or a bill. Such a measure could be used to give legal force to certain claims made by the administration that are not backed up by actual provisions of the agreement, and in particular I would cite the examples of claims made by the administration that no U.S. nuclear exports will go forward in the absence of mutually agreed safeguards arrangements or that exports will be cut off, "should we find out about" Chinese violations of their nonproliferation commitments.

These are statements made by the administration which we do not see backed up by actual provisions in the agreement.

However, the best means available to the committee to insure meaningful congressional debate and a vote on the agreements defects is to advise the President that the agreement should be resubmitted with a waiver. In that instance, as you know, both Houses would have the opportunity to pass a joint resolution of approval, and this would have to happen before the agreement could take effect. But without a Presidential waiver, the agreement takes effect automatically unless both Houses disapprove, and this, of course, is subject to a Presidential veto.

We believe that if the committee requested resubmission of the agreement with a waiver, the President would be hard-pressed to refuse, given the clear and recent Congressional intent that such a request be honored, and given the likelihood of a court challenge of the agreement if the request were not honored.

But the key issue is whether such decisive committee action is warranted, and we believe it is on the basis of three categories of concern: concerns about the reliability of China's current nonproliferation commitments, given various reports of recent Chinese activities with regard to unsafeguarded nuclear assistance to nations that appear to be bent on developing nuclear weapons; concerns about the legal defects in the agreement, which I just highlighted; and also concerns that the agreement will have an adverse long-term impact on nonproliferation objectives with other nations.

Mr. Chairman, you are familiar with the various reports that have appeared in the press and that you have been apprised of in the closed briefings of the committee by the agencies. I would simply want to add that with regard to concerns of China transferring a weapons design to Pakistan, in pursuing some of these reports, the Nuclear Control Institute has received a number of indications from authoritative sources that a nuclear test was conducted in China, probably in 1983, at which the Pakistani Foreign Minister was present.

Apparently there has been no conclusion reached that this was anything other than a test of a Chinese device, although according to one version, the yield did not conform to the current pattern of high-yield Chinese tests, suggesting that this was a test of the early bomb design that China reported has provided Pakistan.

I would suggest, Mr. Chairman, that it is incumbent upon this committee first, to ascertain the facts behind the reports of China's unsafeguarded nuclear assistance to Pakistan and other nations, and second, to come to a clear determination as to how Chinese behavior, past and current, stacks up against China's recent assurances that it has turned over a new leaf. Since all the pertinent information, including the State Department's interpretations of Chinese oral commitments on implementing the agreement is classified, the committee has a special burden to protect the public interest.

Accordingly, the committee should insure that it is receiving intelligence information first hand from the Central Intelligence Agency and not second hand from Federal officials who have been briefed by the CIA. This was a point, as you know, that was just made by Senator Cranston.

It is unsettling, to say the least, that the CIA has declined to participate in the recent classified briefings for all the members of this committee and of the House Foreign Affairs Committee.

Congress has a statutory right to be kept fully and currently informed of all things nuclear, and that should include firsthand intelligence information bearing on all aspects of the pending United States-China nuclear cooperation agreement.

I am concerned, Mr. Chairman, that this agreement is going forward without the two committees of principal jurisdiction having all the facts at hand needed to make a full evaluation. I would urge you to act favorably upon Senator Cranston's request.

In the interest of time, I will now skip to my conclusion.

It should be obvious that there are legal cracks and political minefields in the United States-China Nuclear Agreement, especially in the provisions concerning safeguards and reprocessing. The question, of course, is what is the long-term policy interest in proceeding or not proceeding with this agreement. Surely questions need to be dealt with as to how important are safeguards and consent rights over plutonium in a nuclear weapons state. Also, is the international nonproliferation regime better off with a United States-China nuclear agreement than without one?

The principal difficulty in answering this question, Mr. Chairman, is that we are dealing with largely an unknown quantity: a nation, China, that has presumably turned over dramatically a new leaf, abandoning policies and outlooks that were current only a year or two ago—if we are to believe all that the administration has said about the importance and the significance of this agreement.

On balance, the pending United States-China Nuclear Agreement is not in the long-term interest of the United States and should not be permitted to take effect in its present form. This position may strike some in Government and industry as allowing the best to become the enemy of the good, which is a statement that I have heard a number of times. But the real question is whether the agreement is good enough.

Given its legitimating of plutonium, its neglect of safeguards, its potential for disputes, and its precedential influence in all these respects with regard to our negotiations with other nations, the United States can and should do better.

I would point out that what is good for Westinghouse, what is good for the nuclear industry, may not be good for the United States of America. If we cannot negotiate a better agreement, we should deal ourselves out and seek to influence China from a safe distance, rather than from an uncomfortably close embrace.

Thank you, Mr. Chairman.

[Mr. Leventhal's prepared statement with attachments follow:]

PREPARED STATEMENT OF PAUL LEVENTHAL

I appreciate the Committee's invitation to testify on the non-proliferation policy implications of the pending nuclear-cooperation agreement between the United States and the People's Republic of China.

I am Paul Leventhal, President of the Nuclear Control Institute, a Washington-based, non-profit research organization that deals with problems of nuclear proliferation. As a former staff member of two Senate committees, I worked on atomic energy matters, including hearings and legislation that led to enactment of the Nuclear Non-Proliferation Act of 1978. I am accompanied by our counsel, Eldon V.C. Greenberg of Galloway & Greenberg, who assisted in the preparation of this testimony, as did Daniel Horner of the Institute's staff.

I wish very much I could testify that the agreement is sound and well-crafted. Such an agreement would be most desirable. It would meet the requirements of U.S. non-proliferation law and further the law's objectives at a critical time and in cooperation with a critically important nation. It also would help to ensure continued improvement in the complex relationship between the United States and China, establishing the basis for shared non-proliferation values in particular. Indeed, the Administration cites a number of these objectives in its transmittal of the agreement to Congress.

Unfortunately, the agreement in its present form is seriously flawed and undermines the Administration's own stated objectives. It violates U.S. legal requirements and formalizes fundamental policy disagreements between the two nations. It is a recipe for trouble---serious trouble---both for U.S. efforts generally to curb the spread of nuclear weapons and for future U.S. relations with China in particular.

The fundamental problem with the agreement can be found in the Executive Branch memorandum to the President. "Entry into force of this agreement," stated the Secretaries of State and Energy, "will provide a framework for a continuation of our discussions on non-proliferation matters with the Chinese." [Emphasis supplied.] Yet, after four and a half years of negotiation, the agreement should represent a culmination of nonproliferation discussions with the Chinese. If it does not, there must be some important reasons as to why not. A little digging into the provisions reveals some substantial agreements to disagree.

It is essential that the Committee give high priority to addressing this problem in the time remaining for Congressional consideration of the agreement. Under the recently enacted Proxmire Amendment, the Committee has the prerogative to notify the President that the agreement does not meet the requirements of law. The conference report accompanying the amendment states that in that event, the President is "expected" to withdraw the agreement and either renegotiate it to correct its deficiencies or resubmit it to Congress with a waiver of statutory requirements.

Nuclear Control Institute supports this procedure, which was enacted earlier in the session principally with the then-forthcoming U.S.-China nuclear agreement in mind. We are joined in this position by three other organizations, the Union of Concerned Scientists, the Natural Resources Defense Council and the Sierra Club. Our position is summarized in a letter, dated September 10, 1985, to the Chairman and Ranking Minority Member of the Committee. I have attached to my prepared testimony the letter and two accompanying legal memoranda, dated September 9 and September 20, 1985, which were prepared for Nuclear Control Institute by Mr. Greenberg. I ask that these be included in the hearing record.

The letter states in part:

> We believe that the Agreement for Nuclear Cooperation between the United States and the People's Republic of China, as submitted to the Congress, violates fundamental requirements of U.S. nuclear non-proliferation law. . . .
>
> Acceptance of the agreement as submitted threatens to erode U.S. non-proliferation policy as well as Congressional prerogatives in overseeing that policy. It also invites future diplomatic disputes with China that could jeopardize the improved bilateral relations sought by the Administration and other supporters of the agreement. . . .
>
> We appreciate that there is strong support for this agreement as a means of further solidifying U.S. relations with China. Similarly, there is an understandable reluctance to block the agreement on what may seem to be legal tecnnicalities. But the Committee should bear in mind the serious harm to bilateral relations, and to the credibility of our non-proliferation policy, that has resulted in the past from loosely drafted nuclear agreements.

> In particular, the U.S.-India Tarapur agreement of 1963, motivated by much the same incentives as this agreement with China, became perhaps the single greatest obstacle to harmonious relations with India during the 1970s and early 1980s. The China agreement, like the Tarapur one, contains what are essentially agreements to disagree on such critical matters as application of safeguards and use of transferred materials. The U.S. hope is that these issues will remain hypothetical only, but this may be an imprudent assumption when projected even a few years into the future. Should circumstances change, the nuclear agreement could jeopardize the very interests in smooth U.S.-China bilateral relations that it is meant to promote. . . .

Given the fundamental nature of these problems, the worst outcome would be for the Committee to fail to address them in the hope they will remain hypothetical. The Committee also should resist the temptation to "paper over" the problems in a report accompanying a Joint Resolution of approval, using hortatory, non-binding language to urge stricter interpretation or implementation of the agreement than the agreement itself provides. Such a report almost certainly would be ignored by the Executive Branch in implementing the agreement and could undermine Congressional non-proliferation efforts.

The Committee might seek to plug loopholes in the agreement by means of binding language in a separate Joint Resolution or a bill. Such a measure could be used to give legal force to certain claims made by the Administration that are not backed up in any provisions of the agreement---for example, that no U.S. nuclear exports will go forward in the absence of mutually agreed safeguards arrangements or that exports will be cut off "should we find out about" Chinese violations of their non-proliferation commitments. Such legislation, however, would likely be opposed or watered down by the Administration or vetoed by the President in the interest of not antagonizing the Chinese. Even if a strict measure were enacted, it would be neutralized, at least in the view of the Chinese, by a provision of the agreement stating that its terms cannot be overridden by the "internal law" of either party.

The best means available to the Committee to ensure a meaningful Congressional debate and vote on the agreement's defects is to advise the President that the agreement should be resubmitted with a waiver of the statutory requirements that are not met. In that instance, both Houses would have to pass a Joint Resolution of approval before the agreement could take effect. Without a Presidential waiver, the agreement will take effect automatically unless both Houses disapprove, and such a disapproval is easily foiled by Presidential veto.

Either this Committee or the House Foreign Affairs Committee, or both committees, can request the waiver. It is important to recall that this procedure, enacted earlier this year to compensate for the impact of the Supreme Court's Chaddha decision, assures that the proper balance is maintained between Congressional power and Presidential power and that the President cannot ignore the strict standards of non-proliferation law in pursuit of his foreign-policy aims. Indeed, the Atomic Energy Act specifically provides for the execution of a waiver in the extraordinary circumstance when a proposed agreement may not meet each of the strict requirements of the Act and the President determines "that inclusion of such requirement would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security."

According to the legal opinion prepared for us by Mr. Greenberg, "The agreement with China presents a first and critically important test of the new Congressional review procedures. . . . If there were ever a case for their invocation, it is the present one."

If the Committee requested resubmission of the agreement with a waiver, the President might be hard-pressed to refuse, given the clear and recent Congressional intent that such a request be honored and given the likelihood of a court challenge of the agreement if the request were not honored. The key issue is whether such decisive Committee action is warranted. It is, on the basis of three categories of concern:

o concerns about the reliability of China's current non-proliferation commitments, given various reports that China has provided a number of nations unsafeguarded with nuclear assistance significant to weapons development;

o concerns that the legal defects of the agreement will make U.S. verification of Chinese nuclear activities difficult and will invite future disagreements and a corrosion of relations;

o concerns that the agreement will have an adverse long-term impact on U.S. non-proliferation objectives with other nations.

1. China's Unsafeguarded Nuclear Exports

China's recent record on nuclear exports has raised concerns among a number of analysts. Long after the death of Mao, who had said that proliferation was to be encouraged as a means of weakening the grip of the superpowers, China's export policies have gone far beyond the bounds of international non-proliferation norms.

There have been a number of press reports, citing U.S. intelligence sources, that during the 1980s China has made unsafeguarded shipments of 3 percent enriched uranium to South Africa, 20 percent enriched uranium to Argentina for use in its research reactors, and heavy water to Argentina and possibly to India and South Africa, as well.

Commenting on the significance of these reported transfers, Leonard S. Spector, in his authoritative book, Nuclear Proliferation Today, (A Carnegie Endowment Book, Vintage Books, New York, 1984), states:

> Significantly, because of the particular commodities and recipient countries said to be involved, China's unsafeguarded exports may have contributed to the spread of nuclear weapons around the world. The reported sale of low-enriched uranium to South Africa, for example, may have allowed Pretoria to triple the production of weapons-grade uranium at its Valindaba enrichment plant by using low-enriched uranium as feed instead of natural uranium. Similiarly, if China supplied heavy water to India,... it may have subsequently allowed New Delhi to start up the Madras I nuclear power plant. The Madras plant is India's first unsafeguarded nuclear powerplant and is capable of producing approximately forty kilograms...of plutonium in its spent fuel annually....In essence, New Delhi's ability to run the Madras plant means it can substantially increase the amount of [separated] plutonium available for nuclear arms.

Cause for even greater concern can be found in reports of direct Chinese assistance to Pakistan's nuclear weapons program. On January 28, 1983, the Washington Post cited U.S. intelligence sources in reporting that China had provided Pakistan with sensitive bomb-design information and that the Chinese, without exploding a device, had confirmed that the Pakistanis' subsequent design would work. The article noted, "[N]o other weapons state in recent history has knowingly provided design aid of this kind."

The New York Times later reported, on June 22 and 23, 1984, that certain U.S. government officials had "some evidence" that in 1983 China had provided Pakistan with the bomb design of its fourth test explosion, which was conducted in 1966. This was a low- to intermediate-yield implosion device suitable for use with either plutonium or uranium. Pakistan has programs to produce both materials.

In pursuing these reports, Nuclear Control Institute has received a number of indications from authoritative sources that a nuclear test was conducted in China in 1983, at which the Pakistani Foreign Minister, Sahabzada Yaqub Khan, was present. Apparently there has been no conclusion that this was anything other than a test of a Chinese device, although according to one version, the yield did not conform to the current pattern of high-yield Chinese tests, suggesting that this was a test of the bomb design that China reportedly provided Pakistan.

There are several press reports, again citing U.S. intelligence sources, that China has assisted Pakistan in developing its centrifuge uranium-enrichment facility at Kahuta, the design for which Pakistan stole from the Netherlands Urenco enrichment facility. Indeed, Pakistan may have made those designs available to China in return for the latter's hands-on assistance at Kahuta, according to a report in Nucleonics Week on June 28, 1984.

China's apparent refusal to remove its technicians from Kahuta is reportedly at least one of the reasons for the 15-month delay between the initialing of the U.S.-China agreement in Peking in April 1984 and its signing and submission to Congress by the President last July. On the eve of the signing, according to a report in The New York Times, "Questions were raised about a group of Chinese nuclear specialists who had been seen at a nuclear plant in Pakistan, where American intelligence officials believe work on a nuclear device has been taking place. The Chinese are now thought to have left Pakistan and new statements have been made about its intention not to help other nations develop nuclear weapons" (July 20, 1985).

It is incumbent upon this Committee, first, to ascertain the facts behind the reports of China's unsafeguarded nuclear assistance to Pakistan and other nations and, second, to come to a clear determination as to how Chinese behavior, past and current, stacks up against China's recent assurances that it has turned over a new leaf. Since all the pertinent information---including the State Department's interpretations of Chinese oral commitments on implementing the agreement---is classified, the Committee has a special burden to protect the public interest.

Accordingly, the Committee should ensure that it is receiving intelligence information first-hand from the Central Intelligence Agency and not second-hand from Federal officials who have been briefed by the CIA. It is unsettling, to say the least, that the CIA has declined to participate in the recent classified briefings for Members of this Committee and of the House Foreign Affairs Committee. Congress has a statutory right to be kept "fully and currently informed" on all things nuclear, and that should include first-hand intelligence information bearing on all aspects of the pending U.S.-China nuclear-cooperation agreement.

China has come a considerable distance in terms of its general, public commitments to non-proliferation since negotiations of the agreement began in 1981. In 1983, it ended its nearly 30-year boycott of the International Atomic Energy Agency (IAEA) by signing on as a member. Just last month, China announced at the IAEA General Conference that it would begin negotiations with the Agency "at an appropriate time" to join the other four nuclear-weapon states in voluntarily accepting safeguards on certain of its own civilian nuclear facilities. But China has refused to ratify the Nuclear Non-Proliferation Treaty or to subscribe to the Treaty's preferred system of full-scope safeguards as a condition of export to non-nuclear weapon nations. Instead, it has agreed to require safeguards only on specific items it exports to such nations, apparently signaling an end to unsafeguarded nuclear transfers.

China's specific assurances as to its own behavior remain somewhat murky, however, and have not been reduced to writing, either in the agreement itself or in any attachments to it. The confusion began in January, 1984, with the now-famous White House toast of Premier Zhao, "We do not engage in nuclear proliferation ourselves, nor do we help other countries develop nuclear weapons." Because the future tense was noticeably lacking from this statement, U.S. officials apparently labored hard to obtain a clarification that covered future activities as well. The following May, Premier Zhao elaborated before the National People's Congress, but still in the present tense, stating "[W]e by no means favor nuclear proliferation, nor do we engage in such proliferation by helping other countries to develop nuclear weapons."

The breakthrough did not come until January 18, 1985 when Vice Premier Li Peng, in an interview with Xinhua, the official newspaper, quoted Zhao's statement to the NPC and added: "Here, I wish to reiterate that China has no intention, either at the present or in the future, to help nonnuclear countries develop nuclear weapons. . . . China's nuclear cooperation with other countries, either at present or in the future, is confined to peaceful purposes alone."

But one does not have to be a cynic to harbor doubts about the agreement. On July 10, 1985, just before the agreement was signed and sent to Capitol Hill, *The New York Times* quoted a State Department official as complaining that the difficulty in getting a non-proliferation guarantee from the Chinese is in making sure "it means the same to them as it does to us." The article continues, "China apparently believes that a device it is giving to Pakistan is allowed, while the United States says it is not."

Such doubts were not erased after the agreement reached Capitol Hill. Alan T. Crane of the Office of Technology Assessment, in testimony last month before the House, stated, "The materials accompanying the presidential submission of the agreement to Congress contain interpretations of the more ambiguous sections, but it is not clear that the Chinese hold the same interpretations."

What are the ambiguous provisions? How do they conform with legal requirements? How likely are they to cause trouble in the future?

2. Legal and Political Defects in the Agreement

As noted in our September 10 letter to the Committee, the agreement fails to meet statutory requirements in two critical areas:

First, it does not provide for safeguards on transferred materials and equipment. The Atomic Energy Act requires a "guaranty" of safeguards for all recipients of U.S. nuclear exports, including nuclear-weapon states. Yet the proposed agreement with China specifies only that future "consultations" will take place in order to arrange "exchanges of information and visits."

Second, the agreement does not give the U.S. an unqualified veto over the extraction of weapons-usable plutonium through the reprocessing of U.S. fuel. The Nuclear Non-Proliferation Act (NNPA) requires a "guaranty" that reprocessing or retransfer cannot occur without prior U.S. approval. The House report on the NNPA expresses the intent that this approval right be "clear and simple." Yet the relevant language in Article 5 of the U.S.-China agreement is so vague and so heavily qualified that it almost certainly could not be used to sustain a reprocessing veto against Chinese objections.

In addition to these two outright violations of non-proliferation law, there are two other flaws that can seriously compromise future efforts to protect U.S. interests under the agreement. The agreement states in Article 2, "The parties recognize, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as its justification for failure to perform a treaty."

This section could be nicknamed the "Tarapur proviso" because it effectively states what the Indians must wish they had obtained in their agreement with the United States: immunity from the Nuclear Non-Proliferation Act or any other new laws aimed at upgrading controls against proliferators. As Mr. Greenberg notes in his legal memorandum, international agreements, including the Tarapur one, are often made subject to changing regulatory requirements. He notes that Article 2 of the agreement with China "is an exceedingly unusual provision, for which there is little or no precedent." He continues:

> This provision . . . appears to commit the United States to fulfill all obligations under the Agreement, even if some of those obligations are contrary to existing domestic U.S. law or if nuclear export law and regulations should change in the future. The United States thus leaves itself no flexibility under the Agreement in case of changed legal circumstances. This is a wholly inappropriate restriction on the international legal position the government may wish to take in the future and will surely as well be invoked in opposition to any effort, however salutary, to tighten up export law or policy at some later date.

Another and related problem is that the agreement contains no written commitment by the parties not to assist other nations to develop nuclear weapons, nor a requirement that exports be terminated if the other party provides such assistance. Thus, there is nothing in writing to formalize and give legal weight to the oral statement made by Vice Premier Li Peng, in a newspaper interview, that China's commitment not to engage in weapons-related assistance extends to future as well as present activities.

This is hardly an academic consideration because Section 129 of the Atomic Energy Act requires a cut-off of nuclear exports to any nation found by the President to be assisting a nation without nuclear weapons to acquire them. However, this presumably is one of the provisions of "internal law" that, pursuant to the agreement, cannot be invoked by the United States to justify failure to perform all of its obligations. What, then, is a future U.S. President to do if a future Chinese government no longer feels honor-bound by Li Peng's commitment?

Administration officials maintain that no U.S. nuclear-cooperation agreement ever has required a written commitment by the parties not to assist other nations to develop nuclear weapons. On the other hand, we never before entered into a nuclear agreement with a nation that had been so actively engaged in weapons-related assistance---indeed whose leader once regarded global proliferation as the Chinese equivalent of apple pie!

The central dilemma, according to Peter A. Clausen, a former intelligence offical now with the Union of Concerned Scientists, is that "[T]he agreement is hostage to friendly Chinese-Amercian relations; if they cool, it will become the focus of disputes and acrimony." This, he stresses, is particularly applicable to the ambiguous, highly qualified safeguards and consent-rights provisions alluded to earlier. Mr. Clausen made these points in a recent op-ed article in The New York Times, which I would like to submit for the hearing record.

Regarding safeguards, Mr. Greenberg notes in his legal memorandum that Article 8, the sole provision relating to verification measures, is entitled "Consultations"---not labeled a "safeguards" provision. He rejects the Administration's contention that China, a weapons state, is not subject to safeguards as such, and notes that the agreement leaves ample room for future disagreements over what measures are required:

> Not only does this provision not call for anything rising to the level of "safeguards" in the conventionally understood sense of the term, but, in any event, even the establishment of these arrangements is left to depend upon the outcome of future negotiations. There is thus no assurance that reasonable verification measures will be worked out, and there is a significant risk that later disagreements over the nature of the "exchanges" and "visits" to take place could leave the United States with little or no ability to verify compliance with peaceful-use pledges. Thus, by no stretch of the imagination can the Agreement be said to provide a "guaranty" that safeguards will be applied, as required by the Act.

The same invitation for future difficulty is found in Article 5 dealing with U.S. consent rights over Chinese reprocessing of U.S.-supplied nuclear fuel, or other fuel burned in a U.S.-supplied reactor, to obtain plutonium. On the critical subject of reprocessing, the intent of Congress is particularly clear, but the wording of the provision is muddy to say the least.

There was no House-Senate conference on the Nuclear Non-Proliferation Act, but the House Foreign Affairs Committee, where the statutory provision originated in virtually the form it was enacted, made clear in its report that U.S. consent rights were to be "unqualified and set forth in the agreement unambiguously." The Committee stated, "The ambiguity of past agreements and policies has not only led to genuine confusion, but has provided a pretext for distortion as well. The codification of consistent standards accomplished by this legislation will help to eliminate such possibilities in the future."

After citing this legislative history, Mr. Greenberg notes:

> It is impossible to square Article 5 of the Agreement, the provision concerning reprocessing, with the language and intent of the NNPA calling for spelling out "clearly" and "unambiguously" U.S. consent rights. Indeed, under the U.S.-China Agreement, the United States ability to veto Chinese reprocessing is sharply limited. Not only is the United States required to consider "favorably" requests to enter into long-term arrangements for reprocessing, but if such long-term arrangements cannot be worked out within six months after an initial request, China can proceed with reprocessing on an interim basis unless the United States determines that such activities "would prejudge the long term arrangements for undertaking [reprocessing] or adversely affect cooperation under this agreement." What was an unqualified veto right, in other words, has been made subject to standards found nowhere in U.S. domestic law.
>
> Moreover, the Agreement goes on to specify that consultations shall be carried out "in a manner to avoid hampering, delay or undue interference" with a party's nuclear programs, that "neither party will seek to gain commercial advantage" in the consultation process, and that "[n]othing in this article shall be used by either party to inhibit the legitimate development and exploitation of nuclear energy for peaceful purposes in accordance with this agreement."
>
> This language provides yet additional constraints on the U.S.'s exercise of its veto rights. Indeed, should the U.S. move to reject Chinese requests for reprocessing, the Chinese would almost surely rely on these provisions to challenge the U.S. position. Plainly, therefore, the Agreement falls short of providing the firm "guaranty" required by the Act.

It should be obvious that there are legal cracks and political minefields in the U.S.-China nuclear agreement, especially in the provisions concerning safeguards and reprocessing. What may not be so obvious, however, are the long-term policy implications. Should any defects be tolerated, as the Administration suggests, in the interest of not rocking the diplomatic boat and of helping the nuclear industry? How important are safeguards and consent rights over plutonium in a nuclear-weapon state? Is the international non-proliferation regime better off with a U.S.-China nuclear agreement than without one?

3. Impact on Long-Term U.S. Non-Proliferation Interests

The principal difficulty in answering these questions is that we are dealing with an unknown quantity: a China whose conversion to non-proliferation norms is still open to question and cannot, at any rate, be assured for the long term. Its recent history of sharp swings between political convulsion and moderation suggests that we should proceed with caution. Yet, the highly ambiguous and qualified controls found in key provisions indicates that we may have thrown caution to the wind in the interest of nailing down the agreement.

Under the best of circumstances---good will and non-proliferation values fully shared between us and the Chinese from this point forward---the agreement in its present form obviously will suffice for the United States and China. There still is the problem, however, of its precedential value. A recent Congressional Research Service Issue Brief notes, "European and Japanese negotiators...can be expected to insist upon equal treatment. Any significantly different agreement provisions, especially when compared with those of other recently renegotiated agreements, are likely to be seen as precedential by the countries with whom the United States is still negotiating."

Since we cannot seriously assume the best of circumstances as the basis for long-term (i.e., 30-year) planning with China, and we cannot discount the precedential effect of an agreement with China on our tough-bargaining European and Japanese allies, the question comes down to this: Do we want the pending U.S.-China nuclear agreement to become the new baseline standard for our nuclear dealings with China and for our negotiating posture with other nations? The answer, in my view, is a resounding "no."

As I and others have stressed, the potential of this agreement for poisoning relations with China is large. The example of the Tarapur agreement with India has already been noted, but the similarity ends there. A sudden deterioration in relations with China in the nuclear arena could be far more consequential for the United States than the decade of bad feeling we experienced with India. We are dealing, after all, with a nuclear-weapon state, a nation with which we have been in military conflict, and one that has been an active supplier of nuclear explosive assistance to some questionable customers. A miscalculation could result, in terms of bilateral relations or global consequences, in shooting ourselves in the foot---or worse.

The most likely potential areas of disagreement---safeguards and reprocessing---are not inconsequential, even in a nuclear-weapon state. If China eventually plans to reprocess U.S.-supplied fuel with our consent, safeguards (by whatever name) become exceedingly important.

The Arms Control and Disarmament Agency, in its memorandum to the President, did not mince words on this point:

> . . . ACDA believes that in connection with any future discussions on long-term arrangements and the possible exercise of the United States consent rights over reprocessing, it will be important to ensure that procedures called for under Article 8 are adequate to help verify that any separated plutonium is being used consistent with the provisions of the agreement. *Any procedures for information exchange and visits previously agreed for the transfer of reactors and low enriched uranium fuel may not be sufficient for separated plutonium.* However, the provisions of the proposed agreement are fully adequate to ensure that such arrangements are agreed before any reprocessing takes place. . . . [Emphasis supplied.]

ACDA's confidence that procedures in the agreement are adequate to ensure agreement on "safeguards" arrangements for reprocessing is not found in the provisions themselves, but in the assumption that China will agree to agree rather than to disagree on what arrangements are "fully adequate." At this point, that represents a leap of faith and some wishful thinking. Indeed, it is questionable that "fully adequate" safeguards can be devised for large commercial reprocessing operations *anywhere*.

A major cost of the agreement may yet be the further erosion of U.S. restraints on the separation and use of explosive plutonium throughout the world. China's offer to take in the world's unwanted spent fuel---an offer that could eventually net China hundreds, eventually thousands, of tons of separated plutonium---makes the agreement all the more significant in this regard.

On balance, the pending U.S.-China nuclear agreement is not in the long-term interest of the United States and should not be permitted to take effect in its present form. This position may strike some in government and industry as allowing "the best to become the enemy of the good," but the real question is whether the agreement is good enough.

Given its legitimating of plutonium, its neglect of safeguards, its potential for disputes, and its precedential influence in all these respects, the United States can and should do better. What's good for Westinghouse may not be good for the U.S.A. If we cannot negotiate a better agreement, we should deal ourselves out and seek to influence China from a safe distance rather than from an uncomfortably close embrace.

September 10, 1985

The Honorable Richard G. Lugar
Chairman
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Dear Chairman Lugar:

We believe that the Agreement for Nuclear Cooperation between the United States and the People's Republic of China, as submitted to the Congress, violates fundamental requirements of U.S. nuclear non-proliferation law.

We urge your Committee to request that the President withdraw the agreement and either renegotiate it to bring it into conformity with the law, or acknowledge its deficiencies by resubmitting it with a waiver of statutory requirements.

We understand that hearings on the agreement have been scheduled in October. We ask that the hearings be held earlier, or if this is not feasible, that the Committee act on the waiver question, as discussed below, during the 30-day period provided by law for consultation with the President on this matter. We have sent a similiar request to the Ranking Minority Member of the Committee.

Acceptance of the agreement as submitted threatens to erode U.S. non-proliferation policy as well as Congressional prerogatives in overseeing that policy. It also invites future diplomatic disputes with China that could jeopardize the improved bilateral relations sought by the Administration and other supporters of the agreement.

As discussed more fully in the attached legal memorandum, the U.S.-China agreement fails to meet statutory requirements in two critical areas.

First, it does not provide for safeguards on transferred materials and equipment. The Atomic Energy Act requires a "guaranty" of safeguards for all recipients of U.S. nuclear exports, including nuclear-weapon states. Yet the proposed agreement with China specifies only that future "consultations" will take place in order to arrange "exchanges of information and visits."

Second, the agreement does not give the U.S. a veto over the extraction of weapons-usable plutonium through the reprocessing of U.S. fuel. The Nuclear Non-Proliferation Act (NNPA) requires a "guaranty" that reprocessing or retransfer cannot occur without prior U.S. approval. The House report on the NNPA expresses the intent that this approval right be "clear and simple." Yet the relevant language in Article 5 of the U.S.-China agreement is so vague and so heavily qualified that it almost certainly could not be used to sustain a reprocessing veto against Chinese objections.

We appreciate that there is strong support for this agreement as a means of further solidifying U.S. relations with China. Similarly, there is an understandable reluctance to block the agreement on what may seem to be legal technicalities. But the Committee should bear in mind the serious harm to bilateral relations, and to the credibility of our non-proliferation policy, that has resulted in the past from loosely drafted nuclear agreements.

In particular, the U.S.-India Tarapur agreement of 1963, motivated by much the same incentives as this agreement with China, became perhaps the single greatest obstacle to harmonious relations with India during the 1970s and early 1980s. The China agreement, like the Tarapur one, contains what are essentially agreements to disagree on such critical matters as application of safeguards and use of transferred materials. The U.S. hope is that these issues will remain hypothetical only, but this may be an imprudent assumption when projected even a few years into the future. Should circumstances change, the nuclear agreement could jeopardize the very interests in smooth U.S.-China bilateral relations that it is meant to promote.

Finally, we stress that there are at stake crucial questions of Congressional prerogative and of the integrity of nuclear non-proliferation law. The Committee should seek to prevent an erosion of Congress's statutory authority to review and to act in an effective and meaningful way on U.S. agreements for nuclear cooperation with other nations.

Under the law, the Committee has a 30-day initial consultation period during which it should provide its views to the President "concerning the consistency of the terms of the proposed agreement with all the requirements of [the Atomic Energy Act]." We urge, therefore, that the Committee advise the President that, in its judgment, the agreement does not meet the requirements of the law and ask that it be withdrawn and renegotiated or resubmitted with a waiver.

Only in this way can Congress ensure itself the opportunity to exercise the right to approve a U.S.-China agreement by joint resolution; otherwise, the agreement will take effect automatically unless both Houses disapprove by joint resolution -- an action easily foiled by Presidential veto.

We appreciate your prompt consideration of these issues.

Sincerely,

Paul Leventhal
President
Nuclear Control Institute

Howard C. Ris, Jr.
Executive Director
Union of Concerned Scientists

Brooks Yeager

Brooks Yeager
Washington Representative
Sierra Club

Thomas B. Cochran
Senior Staff Scientist
Natural Resources Defense Council

S. Jacob Scherr
Senior Staff Attorney
Natural Resources Defense Council

Enclosure
cc: Majority Members of the Committee

THE NEW YORK TIMES, SATURDAY, OCTOBER 5, 1985

A Porous Nuclear Pact

By Peter A. Clausen

CAMBRIDGE, Mass. — The agreement for United States nuclear cooperation with China, before Congress, is a porous document that fails to meet requirements of the Atomic Energy Act. Congress seems inclined to overlook this awkward problem.

Almost everyone wants good relations with China, and the nuclear industry is starved for markets. But as we learned from long, painful experience with India, loosely drafted nuclear agreements can haunt us. Those who view nuclear cooperation as a path to closer political ties should recall that the 1963 Tarapur reactor accord, motivated by similar aims, became a source of tension and ill will.

The new agreement would permit the export of reactors and uranium fuel to China. The Atomic Energy Act imposes strict conditions on such exports, and China has balked at two of the most important — safeguard inspections to insure that assistance is not diverted to military uses, and an American veto over any reprocessing of our fuel to extract plutonium, which can be used as a fuel or as the explosive material for nuclear arms.

The accord with China may backfire

On these points, the pact resorts to ambiguous language that fails to bridge the gap between our law and Chinese policy. In place of the required guarantee of inspections, we settled for a token commitment to consult on "mutually acceptable arrangements for exchanges of information and visits." The Administration claims inspections are moot since China has nuclear arms, but the argument doesn't stand up. We would not supply unsafeguarded exports even to our nuclear-armed allies, France and Britain, and certainly not to the Soviet Union.

The provisions for reprocessing are equally unsatisfactory. If China wishes to reprocess our fuel, the pact obliges us to "consider such activities favorably." American veto rights are so heavily qualified as to be worthless should China contest them in practice. This is a precedent that no doubt would be happily accepted by Japan and other countries with whom we have had perennial tensions over reprocessing. One cost of the agreement is that it will weaken diplomatic efforts to restrain plutonium production by such countries.

But advocates of cooperation with China should be alert to another danger — the pact's potentially corrosive effect on relations. The India case is disquietingly relevant. There, too, controversial safeguards and reprocessing issues were settled by an agreement to disagree, with the hope that the disputes would remain hypothetical and that cooperation would help move India toward more responsible nuclear policies.

Instead, Indian and American nuclear policies diverged sharply during the 1970's. India exploded a nuclear device, and America tightened its rules for nuclear cooperation. For several years, conflicts in the Tarapur pact were the greatest single source of discord between the two countries. In 1983, America extricated itself from the agreement, but our rights over the fuel previously supplied remain in dispute.

The China case is different in that China is a nuclear state. But that does not guarantee that the lax provisions on safeguards and reprocessing will never become contentious. It is not hard to imagine events — Soviet-Chinese rapprochement, resumption of irresponsible nuclear exports by China, which reportedly aided Pakistan's bomb program — that would erase our complacency. The agreement is hostage to friendly Chinese-American relations; if they cool, it will become the focus of disputes and acrimony.

Supporters of the agreement may be willing to run this risk, but they should face it with eyes open. The Reagan Administration discourages this by pretending that the agreement conforms to the legal standard. As submitted, it will take effect automatically unless disapproved by a joint resolution of Congress. The law provides a sounder procedure: The President should acknowledge the deficiencies and ask for a waiver of Atomic Energy Act requirements. Congress would then have to approve the agreement by a majority vote of both houses, guaranteeing a debate and — even if the agreement passed — avoiding another episode of absent-minded nuclear cooperation. □

Peter A. Clausen is senior arms analyst for the Union of Concerned Scientists.

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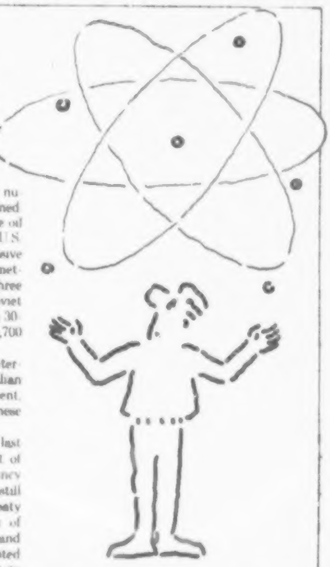
The Washington Post
WEDNESDAY, MAY 2, 1984

Paul Leventhal

What That Nuclear Pact With China Should Say



Now that the Reagan administration has negotiated but not yet disclosed the particulars of a peaceful nuclear cooperation agreement with China, we should be clear at the outset as to what such an agreement should contain in the interest of curbing the global spread of nuclear weapons. If congressional and public consideration of a proposed U.S.-China nuclear pact is to be kept clear of ideological passions, there should be a dispassionate set of nonproliferation criteria against which to judge it.

The importance of U.S. nuclear assistance to China transcends both the potential it offers for further normalizing relations between Washington and Peking and the potential multi-billion-dollar plum it represents for U.S. nuclear vendors (especially Westinghouse, which has the inside track for the first of eight large power reactors that China plans to build at a cost of up to $25 billion).

The most important and least discussed aspect of a nuclear agreement with China is its potential impact on Third World nations that now look to China as role model and leader, and may soon be looking to China as a nuclear supplier. A good agreement with China could stand as a major bulwark against acquisition of nuclear weapons by these nations; a bad agreement could accelerate the spread of the Bomb and nuclear violence.

> *"The most important and least discussed aspect of a nuclear agreement with China is its potential impact on Third World nations that now look to China as role model. . . ."*

China has a less than reassuring track record for curbing the spread of nuclear weapons. It is one of two nuclear weapons states (France being the other) that have refused to ratify the Treaty on the Non-Proliferation of Nuclear Weapons. Over the past two years, there have been authoritative press accounts, citing U.S. and British government sources, of China transferring to Pakistan, a nation suspected of seeking nuclear weapons, technical information for producing atomic bomb material and for designing the actual bomb. There have been reports of China acquiring much-needed hard currency through nuclear sales to customers believed to be embarked on weapons programs—low-enriched uranium to South Africa and heavy water to Argentina and possibly to India as well.

The legitimacy of China's need for nuclear power plants can also be questioned. In addition to large projected off-shore oil reserves now being explored with U.S. technical assistance, China has massive *proven* coal reserves—400-500 billion metric tons, ranking it among the top three with the United States and the Soviet Union and giving it the equivalent of a 30-year, or lifetime, supply of fuel for 3,700 large power plants.

However, assuming China is determined to join the superpowers in civilian as well as military nuclear development, what is the *current* outlook for Chinese cooperation on nonproliferation?

Anxious to build good will, China last year ended its nearly 30-year boycott of the International Atomic Energy Agency by becoming a member. But China still refuses to sign the nonproliferation treaty and to embrace the IAEA's system of comprehensive safeguards inspections and audits. In January, Premier Zhao toasted President Reagan at a White House state dinner by saying, "We do not engage in nuclear proliferation ourselves, nor do we help other countries develop nuclear weapons."

Zhao's statement must be transformed into an unambiguous, written commitment. Given China's preeminence in the Third World, a U.S.-China nuclear agreement should set the highest possible standard for such accords, not merely redefine the lowest common denominator.

China's fledgling nuclear power program is critically in need of outside technological assistance. Although Britain, West Germany, France and Japan are actively competing with the United States for nuclear sales to China, the Chinese appear to prefer and to be holding out for American technology. The United States, therefore, is in a position to obtain a landmark nuclear agreement—even going beyond the minimal requirements of current nonproliferation law—if the Reagan administration does not sacrifice long-term nonproliferation interests for short-term political expediency.

What Chinese commitments should a "good" agreement contain?

First, China should commit in writing not to assist other nations in acquiring nuclear weapons.

Second, as a nuclear weapons state, China should commit to using its own civilian nuclear power program for exclusively non-military purposes. In drawing a clear line between its civilian and weapons programs, China should agree to accept some international safeguard inspections on a voluntary basis as the United States and Britain now do and as the Soviet Union has agreed to do.

Third, China should agree either to ratify the Nuclear Non-Proliferation Treaty or at least to embrace the treaty's requirement that exports to nations not possessing nuclear weapons are conditional upon those nations accepting international safeguards inspections on *all* their nuclear activities. This treaty provision already has been undercut by France's refusal to ratify the treaty or to require comprehensive safeguards on its exports to nonnuclear weapons states. If China joins France as a major supplier outside the treaty's safeguards system, an already fragile global nonproliferation regime is likely to come apart in the years ahead.

Fourth, China should agree to U.S. prior consent on any separation of weapons-grade plutonium from U.S.-supplied nuclear fuel or any fuel used in U.S.-supplied reactors. The United States also should have consent rights over any retransfers of U.S.-supplied nuclear equipment, technology and materials to third nations.

Under a key provision of the Nuclear Non-Proliferation Act, the United States cannot engage in nuclear trade with any nation that has "assisted, encouraged or induced" a nation not possessing nuclear weapons to develop nuclear explosive devices, unless the president finds that "sufficient progress toward terminating such assistance, encouragement or inducement" has been made.

Consequently, no agreement with China should be permitted to go forward until the entire matter of China's transfer of nuclear weapons information to Pakistan is brought into the open by the president and is certified by him to have ended.

The writer, formerly staff director of the Senate subcommittee on nuclear regulation, is president of the Nuclear Control Institute in Washington.

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September 9, 1985

MEMORANDUM

Legal Deficiencies in the U.S.-China Agreement for Nuclear Cooperation and the Need for Enhanced Congressional Review

The purpose of this memorandum is to set forth briefly the legal case for urging the President to withdraw the Agreement for Nuclear Cooperation between the United States and the People's Republic of China, submitted to the Congress for consultation on July 24, 1985 (the "Agreement"), and either to renegotiate the Agreement or to resubmit the Agreement with an appropriate waiver of statutory requirements under Section 123 of the Atomic Energy Act of 1954 (the "Act"), as amended by the Nuclear Non-Proliferation Act of 1978 (the "NNPA") and most recently by Section 301 of the Export Administration Amendments Act of 1985 (Pub. L. No. 99-64) (the "1985 Amendments"). As explained below, because the Agreement does not meet the requirements of Section 123a. of the Act, such a procedure is necessary if the integrity of the statutory non-proliferation regime and the prerogatives of the Congress in reviewing agreements for cooperation are to be preserved.

(a) Deficiencies in the U.S.-China Agreement

A review of the Agreement immediately reveals that there are at least two fundamental deficiencies under the Act: 1/

(1) Application of Safeguards -- Section 123a.(1) of the Act requires a "guaranty" by a cooperating party that "safeguards" will be maintained with respect to all equipment and materials transferred pursuant to an agreement for cooperation and all materials used in or produced through the use of such materials and equipment. This requirement applies without regard to whether the cooperating party is a weapon or non-weapon state, and all U.S. nuclear trading partners to date (including the United Kingdom and France -- weapon states -- under the umbrella of the U.S.-EURATOM

1/ In addition to the two deficiencies under the Act discussed below, the Agreement with China states in Article 2, para. 1, "The parties recognize, with respect to the observance of this agreement, the principle of international law that provides that a party may not invoke the provisions of its internal law as its justification for failure to perform a treaty." This is an exceedingly unusual provision, for which there is little or no precedent. Indeed, international agreements are often made specifically subject to changing regulatory requirements. This provision, however, appears to commit the United States to fulfill all obligations under the Agreement, even if some of those obligations are contrary to existing domestic U.S. law or if nuclear export law and regulations should change in the future. The United States thus leaves itself no flexibility under the Agreement in case of changed legal circumstances. This is a wholly inappropriate restriction on the international legal position the Government may wish to take in the future and will surely as well be invoked in opposition to any effort, however salutary, to tighten up export law or policy at some later date.

agreement) have accepted application of stringent safeguards to transfers of U.S. materials and equipment. 2/ The authorization of unsafeguarded nuclear transactions, in other words, is essentially without precedent in any prior U.S. agreement, whether with a non-weapon or a weapon state. 3/

The Administration, in the Nuclear Proliferation Assessment Statement (the "NPAS") submitted to the Congress and in testimony presented to the House Foreign Affairs Committee on July 31, 1985, has argued that the Agreement satisfies the requirements of Section 123a.(1), without ever directly addressing what the term "safeguards" in the Act means. Instead, the Administration has contended that, given China's status as a weapon state and the corollary lack of requirement for application of IAEA safeguards, the only safeguards mandated under the Act are, in effect, whatever the parties happen to agree to by way of "exchanges of

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2/ Indeed, in the United States' Power Agreement with the United Kingdom, entered into in July of 1966, and since superseded by the EURATOM agreement, the parties agreed that the International Atomic Energy Agency (the "IAEA") would "be requested to assume responsibility for applying safeguards to materials transferred under this Agreement."

3/ While there were some ambiguities on this point in the two earliest research and power agreements -- entered into with the United Kingdom and Canada, respectively, in July, 1955 -- which do not contain comparable safeguards provisions to those found in other cooperative accords, these ambiguities were obviously not based on the weapons status of the recipients and were remedied in all later agreements. Moreover, in the specific cases of Canada and the United Kingdom, Canada subsequently accepted IAEA safeguards on all its peaceful nuclear activities, while, as noted above, EURATOM safeguards have been made applicable to transfers to the United Kingdom.

information" or "visits". NPAS at II-2--II-5; *Statement of Hon. Richard Kennedy in Hearings on the U.S.-China Agreement for Cooperation the House Committee on Foreign Affairs*, 99th Cong., 1st Sess. (July 31, 1985). Implicitly, the Administration appears to take the position that the actual nature of the safeguards doesn't matter very much, because China is a weapon state and therefore free to pursue military uses of atomic energy. The Administration's argument, however, is simply not responsive to the explicit terms of U.S. law. 4/

Contrary to the Administration's analysis, "safeguards" is a term of art which is ordinarily understood to mean the application of materials accounting procedures and techniques, together with installation of appropriate monitoring devices and the conduct of periodic inspections, to ensure that equipment and materials are not diverted for non-peaceful purposes. Such safeguards have been required by U.S. law under Section 123a.(1) and its predecessor provision for all nuclear exports, without regard to the weapons status of the recipient, since the inception of the Atoms for Peace

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4/ The Administration's position, it should be noted, also runs counter to well-established U.S. non-proliferation policy. The United States has insisted, in its own programs, on a rigid separation between military and peaceful facilities and uses, *see*, *e.g.*, Section 57e. of the Act, 42 U.S.C. §2077e., Pub.L. No. 97-415, §14, 96 Stat. 2075 (1982) (ban on the use of commercial spent fuel for the production of weapons), and has never deviated from the principle, enshrined in Section 123 of the Act since 1954, that its civilian nuclear exports must in no way support military applications of atomic energy.

program and before the advent of the IAEA. See Act of August 1, 1946, c. 724, §123, as added August 30, 1954, c. 1073, §1, 68 Stat. 940. 5/ Every reference to "safeguards" -- whether IAEA or not -- in the legislative history of the NNPA is in this materials accounting sense. E.g., S.Rep. No. 95-467, 95th Cong., 1st Sess. 10-12 (1977); H.Rep. No. 95-587, 95th Cong., 1st Sess. 17-20 (1977) (discussion of "timely warning" concept).

The Agreement with China contains no such safeguards requirements. Article 8, the sole provision in the Agreement relating to verification measures, is, significantly, not labeled as a "safeguards" provision -- it is entitled "Consultations" -- and it simply calls for the parties to "use diplomatic channels to establish mutually acceptable arrangements for exchanges of information and visits to material, facilities, and components subject to this agreement." 6/ Not only does this provision not call for

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5/ These safeguards were originally bilateral in nature and, over time, were replaced as a matter of policy by IAEA safeguards. The additional legal requirement for "full-scope" IAEA safeguards in non-weapon states (Section 123a.(2) of the Act) was added by the NNPA in 1978.

6/ Article 8, para. 2, in fact states that, because both parties are weapon states, "bilateral safeguards are not required." The justification for this statement is dubious. While Section 123a.(1) of the Act does not specifically call for "bilateral" safeguards as such but rather provides that the safeguards to be maintained shall be those "as set forth in the agreement for cooperation", this provision, quite apart from it making no distinction between weapon and non-weapon states, can scarcely be read as authorizing an agreement to set forth no safeguards at all. Indeed, such a (Footnote continued on next page...)

anything rising to the level of "safeguards" in the conventionally-understood sense of the term, but, in any event, even the establishment of these arrangements is left to depend upon the outcome of future negotiations. There is thus no assurance that reasonable verification measures will be worked out, and there is a significant risk that later disagreements over the nature of the "exchanges" and "visits" to take place could leave the United States with little or no ability to verify compliance with peaceful use pledges. Thus, by no stretch of the imagination can the Agreement be said to provide a "guaranty" that safeguards will be applied, as required by the Act.

(2) Control Over Reprocessing -- The Agreement is equally lacking in adequate controls over reprocessing. The Administration has basically argued that the Agreement is satisfactory because "China cannot unilaterally proceed...in the face of U.S. objections." NPAS at II-9. In any event, the Administration has assured Congress and the public that China has no present plans to undertake such activities and thus any problems under the Agreement are far in the future (and presumably outweighed by the present benefits of

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reading of the Act would be absurd. The language of a statute must be interpreted to give meaning and effect to all its terms. E.g., United States v. Menasche, 348 U.S. 528, 538-539 (1953); National Soft Drink Ass'n. v. Block, 721 F.2d 1348, 1352 (D.C. Cir. 1983).

obtaining an agreement). See Statements of Hon. Kenneth Adelman and Hon. Richard Kennedy in Hearings on the U.S.-China Agreement for Cooperation before the House Committee on Foreign Affairs, 99th Cong., 1st Sess. (July 31, 1985). Once again, the Administration's analysis is wide of the mark -- the fundamental issue is whether the United States has a free hand under the Agreement to raise a "unilateral objection", while the present intentions of the Chinese are perfectly irrelevant to the legal validity of the Agreement.

Section 123a.(7) of the Act provides that agreements for cooperation must contain a "guaranty" that the United States will be able to exercise an absolute veto, with no constraints applicable to such exercise, over the reprocessing of materials supplied by the U.S. or materials used in or produced through the use of any materials or facilities supplied by the United States. The very purpose of including this provision in the NNPA was to respond to the "variable controls" over reprocessing found in existing agreements and replace them with "a clear and simple right to approve the retransfer and reprocessing of U.S. materials." H.Rep. No. 95-587, 95th Cong., 1st Sess. 4 (1977) (emphasis added). In its report on the NNPA, the House Foreign Affairs Committee stated, "The ambiguity of past agreements and policies has not only led to genuine confusion, but has provided a pretext for distortion as well. The codification of consistent standards accomplished by this legislation will help to eliminate such possibilities in the future." *Id.* at 7. It went on to emphasize that the prior consent requirements were meant to "augment" U.S. controls over retransfers and reprocessing and the Congress intended that the U.S. consent rights "be *unqualified* and set forth in the agreement *unambiguously*." *Id.* at 13-14 (emphasis added).

It is impossible to square Article 5 of the Agreement, the provision concerning reprocessing, with the language and intent of the NNPA calling for spelling out "clearly" and "unambiguously" U.S. consent rights. Indeed, under the U.S.-China Agreement, the United States' ability to veto Chinese reprocessing is sharply limited. Not only is the United States required to consider "favorably" requests to enter into long-term arrangements for reprocessing, but if such long-term arrangements cannot be worked out within six months after an initial request, China can proceed with reprocessing on an interim basis unless the United States determines that such activities "would prejudge the long term arrangements for undertaking [reprocessing] or adversely affect cooperation under this agreement". 7/ What was an

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7/ Arguably, since this particular provision is written in reciprocal terms -- both parties "agree to refrain from actions which either party believes" would have the requisite negative effect -- the United States, even if it wished to do so, may not be able to block Chinese reprocessing. If, for example, China took the position that the withholding of consent by the United States would prejudge long-term arrangements or adversely affect cooperation, it might well contend that it was free to commence interim reprocessing activities. The State Department's assurances that the Chinese cannot proceed in the face of U.S. objection are thus less than reassuring.

unqualified veto right, in other words, has been made subject to standards found nowhere in U.S. domestic law. Moreover, the Agreement goes on to specify that consultations shall be carried out "in a manner to avoid hampering, delay or undue interference" with a party's nuclear programs, that "neither party will seek to gain commercial advantage" in the consultation process, and that "[n]othing in this article shall be used by either party to inhibit the legitimate development and exploitation of nuclear energy for peaceful purposes in accordance with this agreement." This language provides yet additional constraints on the U.S.'s exercise of its veto rights. Indeed, should the U.S. move to reject Chinese requests for reprocessing, the Chinese would almost surely rely on these provisions to challenge the U.S. position. 8/ Plainly, therefore, the Agreement falls short of providing the firm "guaranty" required by the Act.

(b) The Role of Congress in Review

The NNPA recognizes that there may be extraordinary circumstances where a proposed agreement for cooperation may not meet the strict requirements of Section 123 of the Act. Section 123a. of the Act provides the President with an appropriate mechanism for moving forward with such agreements, namely, the execution of a waiver based upon a

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8/ To the extent such action by the United States was also based on a change in law or policy, the Chinese would almost surely invoke Article 2, para. 1, as well to contend that such actions would violate the United States' obligations under the Agreement. See page 2, note 1, supra.

determination "that inclusion of any such requirement would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security." At the same time, the Act, as amended just this July by Section 301 of Pub. L. No. 99-64, recognizes that Congress must play an enhanced review role where a proposed agreement is *or may be* in non-compliance with the requirements of Section 123a.

The Congressional prerogative is twofold in situations such as the present one:

First, under Section 123b. of the Act, during an initial 30 day consultation period, the House Committee on Foreign Affairs and/or the Senate Committee on Foreign Relations should provide their views to the President "concerning the consistency of the terms of the proposed agreement with all the requirements of [the] Act." The Conference Report on the 1985 Amendments makes it clear, in turn, that if either Committee deems any provision of an agreement inconsistent with the Act, the President is "expected" to respond to this expression of Congressional views either by renegotiating the agreement or resubmitting the agreement with a waiver. H.Rep. No. 99-180, 99th Cong., 1st Sess. (1985), *reprinted in* 131 *Cong. Rec*. H.4905, H.4919-H.4920 (daily ed., June 25, 1985). *See also* 131 *Cong. Rec*. S.8925 (daily ed., June 27, 1985)(Statement of Senator Proxmire).

Second, where an agreement cannot meet the statutory criteria and where, therefore, an agreement must be submitted with a waiver, under Section 123d. of the Act that agreement can become effective only if "Congress adopts, and there is enacted, a joint resolution stating that the Congress does favor such agreement." This procedure assures that the proper balance is maintained between Congressional power and Presidential power and that the President cannot, in the pursuit of his foreign policy aims, run roughshod over the strict standards of Congressionally-adopted non-proliferation legislation. [9]

The Agreement with China presents a first and critically-important test of the new Congressional review procedures in Section 123. If there were ever a case for their invocation, it is the present one.

The kind of uncertain and ambiguous commitments currently found in the U.S.-China Agreement almost certainly set the stage for potential future disputes over fundamental elements of cooperation, such as the application of safeguards and the exercise of consent rights. In short, the Agreement contains provisions of precisely the sort that got the United States into trouble in the mid-1970s, i.e., with India, and is likely to produce precisely the results which the NNPA was intended to avoid. Rather than cementing good U.S.-Chinese relations for the future, it could, like the U.S. agreement with India to supply and fuel the Tarapur reactors, readily become a major source of discord and tension between the two countries.

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[9] By contrast, where there is no waiver, under Section 123d. of the Act an agreement can go into effect after a 60-day Congressional review period unless Congress passes a joint resolution of disapproval. And, of course, the President can veto that resolution.

In such circumstances, it is essential that the Senate and House Committees advise the President that, in their judgment, the Agreement does not meet the requirements of the Act and that the President must either renegotiate the Agreement or resubmit it with a waiver. Only such a course of action will ensure that Congress has an appropriate opportunity to exercise its approval rights by joint resolution, if necessary, under Section 123d. of the Act. And only such a course of action will preserve the integrity of the NNPA, both in terms of its substantive requirements and its procedures for review of agreements for cooperation.

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September 20, 1985

MEMORANDUM

Legal Deficiencies in the U.S.-China Agreement for Nuclear Cooperation: A Comment on the Executive Branch's Analysis

In preparing my memorandum of September 9 concerning the lawfulness of the Agreement for Cooperation between the Government of the United States of America and the Goverment of the People's Republic of China Concerning Peaceful Uses of Nuclear Energy, submitted to the Congress for consultation on July 24, 1985 (the "Agreement") [1], I did not have the benefit of the Executive Branch's legal analysis of the Agreement, as set forth in a Memorandum transmitted to the Chairman of the House Committee on Foreign Affairs on August 30, 1985 (the "Executive Branch Memorandum"). I have since reviewed the Executive Branch Memorandum, and, for the reasons set forth below, find it fundamentally unpersuasive.

1) Application of Safeguards

The Executive Branch Memorandum concludes that the Agreement meets the requirements of Section 123a.(1) of the

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[1] *See* H.Doc. No. 99-86, 99th Cong., 1st Sess. (July 24, 1985).

Atomic Energy Act of 1954, as amended (the "Act"), because it falls within what the Memorandum characterizes as "precedent" for "safeguards" provisions in other agreements for cooperation entered into by the United States under Section 123 of the Act. The Memorandum argues that "practice under [Section 123] since 1954 makes clear that safeguards 'as set forth in the agreement' varied widely from no safeguards at all, to safeguards primarily implemented by the cooperating party, to elaborate bilateral safeguards provisions with detailed U.S. inspection rights," Executive Branch Memorandum at 6, and that this practice demonstrates that the Executive Branch has "broad discretion to vary the safeguards provisions in agreements for peaceful nuclear cooperation as... deemed appropriate to the circumstances". Executive Branch Memorandum at 10. 2/ The history of the implementation of the Act, however, does not support the breadth of discretion claimed by the Executive Branch.

In presenting its argument, the Executive Branch relies primarily on two categories of early agreements for cooperation: one, three agreements dating from June, 1955, with the United Kingdom, Belgium and Canada, respectively, which arguably do not contain safeguards requirements comparable to those found in other agreements (Executive

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2/ As pointed out in my memorandum of September 9 (at 5-6, note 6), this statement is overreaching on its face. Whatever discretion the Government may have to vary safeguards guarantees, it has none to eliminate them altogether, as it has done in the China Agreement.

Branch Memorandum at 6-7); and, two, a series of agreements, also dating from the 1950s, where the recipient country is characterized as having "primary responsibility" for the maintenance of safeguards (Executive Branch Memorandum at 7-9). Several points, however, undercut the relevance of these "precedents" as support for the approaches to verification embodied in the China Agreement:

First, they *all* call explicitly for the application and maintenance of what the agreements themselves term "safeguards" to provide assurances against diversion. By contrast, the Agreement with China nowhere calls for the application of "safeguards" of any sort, but, as set out in Article 8, merely requires "consultations" concerning as yet unspecified "exchanges of information" and "visits".

Second, *all* the accords, to the extent cooperation has been implemented, were superseded or modified by later arrangements with more specific safeguards requirements in the materials accounting, containment, surveillance and inspection sense. Thus, in the first category, EURATOM safeguards were made applicable to transfers to the United Kingdom and Belgium, while Canada accepted International Atomic Energy Agency ("IAEA") safeguards on all its peaceful nuclear activities. *See* Energy Research and Development Administration, *Final Environmental Statement on U.S. Nuclear Power Export Activities* 3-113, 3-115, 3-116 (ERDA-1542, April, 1976). 3/ By the same token, in the second category,

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3/ While the Executive Branch Memorandum blithely asserts

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provisions were included in the agreements to assure application of IAEA safeguards to all transfers thereunder. _See_ Congressional Research Service, _United States Agreements for Cooperation in Atomic Energy_, 94th Cong., 2d Sess. 63C, Appendix I at CRS 39-40 (January, 1976) (hereinafter "CRS Report"). No similar safeguards applications appear to be contemplated under the Agreement with China.

Third, the agreements in the second category were of a research nature, containing no provisions which would allow the export of nuclear power equipment and fuel. _See_ McKinney, _Background Material for the Review of the International Atomic Policies and Programs of the United States, Report to the Joint Committee on Atomic Energy_, 86th Cong., 2d Sess. Vol. 2, 430-435 (October, 1960) (hereinafter "McKinney Report"). Thus, they provide no precedent for the transfer of power reactors and fuel contemplated under the China Agreement. In any event, the United States retained rights under these agreements substantially broader than anything found in the Agreement with China, including the rights to "require maintenance and production of operating records and... designate personnel who shall have access in the recipient nation to all places and data necessary to account for Special Nuclear Material...." CRS Report at 63A

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(at 12-13) that these three agreements as originally entered into "were sufficient for the purposes of U.S. law", this assertion is in fact debatable: there was never any legal test of the sufficiency of such agreements under Section 123.

(describing agreements with Greece, Colombia, Indonesia, Iran, Ireland, Israel and Turkey) 4/.

Fourth, from the very first, dating from 1956, U.S. power agreements, other than the highly exceptional understandings with Belgium, Canada and the United Kingdom, 5/ made provision for the application and maintenance of conventional safeguards. McKinney Report at 441. *See also* Statement of Myron Kratzer in *Hearings on Improving IAEA Safeguards before the Subcommittee on International Security and Scientific Affairs and the Subcommittee on International Economic Policy and Trade of the House Foreign Affairs Committee*, 97th Cong., 2d Sess. 23 (March 3, 1982). As Mr. Kratzer, one of the principal architects of the safeguards

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4/ It might further be questioned whether any agreements pre-dating enactment of the Nuclear Non-Proliferation Act of 1978 (the "NNPA") can provide precedent for the approach to safeguards embodied in the Agreement with China. The Executive Branch Memorandum asserts (at 12) that Congress, when it revised Section 123 in 1978, intended to allow retention of "the historical flexibility that had been available to vary the 'safeguards' provisions as appropriate for each agreement." It is just as reasonable to conclude, however, that Congress, in considering the then-current state of U.S. agreements, believed that, in extending the requirements of Section 123a.(1), it was ratifying the safeguards practice of the Government as it had evolved since the 1950s and, in effect, mandating the application of safeguards as they had come to be commonly understood and applied by successive Administrations, namely, materials accountancy, containment, surveillance and inspections.

5/ These understandings, it should be noted, were deemed "special" in nature at the time and were based, in the case of the United Kingdom and Canada, on World War II cooperation, and, in the case of Belgium, on Belgium's contribution to the war effort through the supply of uranium from the Congo. *See* McKinney Report at 427-430. No similar agreements were ever entered into again.

regime, has stated, "[T]he central feature [of these early agreements] is language ... providing broad rights of access by inspectors ... to account for the nuclear material subject to the safeguards and determine compliance with the Agreement." Id. The China Agreement is, then, truly an unprecedented exception to 30 years of practice under the Act.

While the Executive Branch now finds it convenient to claim "broad discretion" in determining how to meet the requirements of Section 123a.(1) in order to justify the Agreement with China, this claim represents something of a new departure. Indeed, in the past, the Executive Branch has often been at pains to point out that it has been vigilant in assuring the application of "safeguards" in the conventionally-understood sense to U.S. nuclear exports. As early as 1958, in its semi-annual report to Congress, the U.S. Atomic Energy Commission (the "AEC") stressed, without qualification, that both research and power agreements contained safeguards provisions giving the United States "the right to obtain maintenance, production and operating records and other data necessary to accomplish accountability for special nuclear materials, and to afford access to all places and data necessary to verify compliance with the terms of the agreements," while power agreements, in particular, contained safeguards provisions which "conform[ed] closely to similar provisions of the statute of the International Atomic Energy Agency." AEC, Twenty-Third Semi-Annual Report to the Congress, S.Doc. No. 72, 85th Cong., 2d Sess. 198, 199

(January, 1958) Further, in its comprehensive 1976 description of nuclear power export activities, the Energy Research and Development Administration categorically stated,

> Except with respect to Canada and the United Kingdom... *all* Agreements for Cooperation with individual nations on the peaceful uses of nuclear energy contain provisions giving the U.S. the right to apply specific safeguards to verify that U.S.-supplied nuclear materials and equipment are not used for the research on or development of nuclear weapons or for any other military purpose.

Energy Research and Development Administration, *Final Environmental Statement on U.S. Nuclear Power Export Activities* 3-97 (ERDA-1542, April, 1976) (emphasis added). *See also id*. at 3-88. 6/ In short, at least when power applications are concerned, the Government has previously appeared to take the position that guarantees concerning the application and maintenance of safeguards have not only been required but in fact uniformly included in agreements for cooperation.

6/ In explaining the Government's approach to safeguards, the same document states:

> Since no international safeguards system existed at the time the U.S. initiated its export activities, the U.S. assumed safeguards responsibility for U.S. supplied materials and equipment through its bilateral agreements. These bilateral agreements were based on a comprehensive revision of the Atomic Energy Act of 1954 which required a guarantee from the cooperating party that any material to be transferred pursuant to an Agreement for Cooperation would not be used for atomic weapons, for research on or development of atomic weapons or for any other military purposes.
>
> The U.S. bilateral safeguards program was principally concerned with determining that supplied materials and

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Ultimately, the Executive Branch's efforts to turn the clock back to the mid-1950s to assess the adequacy of the China Agreement must be unavailing. The history of the past thirty years is one of continual broadening and strengthening of safeguards requirements, so that today all of the United States' trading partners are subject to stringent multilateral safeguards as the term has commonly come to be understood. Congress, if anything, has ratified this development, not the retention of unbridled discretion by the Government to do what it wants with the safeguards requirements of the law. In such circumstances, it is absurd to seek to justify the China Agreement in terms of early and, in some cases, anomalous appraches to cooperation and long since discarded concepts with little or no relevancy to the transfer of power reactors and fuel under the Act.

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> facilities were not used to further any military purpose. It consisted of two basic elements: (1) the maintenance and review by the U.S. of records and reports showing receipt, production, consumption, transfer, use, and current location of all nuclear materials; and (2) onsite inspections (which were unprecedented and sweeping in nature) to verify independently the validity of the reports and records as well as the compliance with the commitment to peaceful uses.
>
> Safeguards provisions were included in the first bilateral Agreement for Cooperation in the civil uses of nuclear energy, signed with Turkey in June, 1955, and were incorporated in all subsequent Agreements concluded with individual countries and international organizations.

_Id._ at 6-22.

2) Control over Reprocessing

With respect to the retention of consent rights over reprocessing, as required by Section 123a.(7) of the Act, the Executive Branch Memorandum reaches two basic conclusions: one, that the mere raising of a U.S. objection is sufficient to block any move by the Chinese to commence reprocessing activities, and, two, that the qualifying language contained in Article 5 of the Agreement does not undercut U.S. consent rights. Neither conclusion is supportable.

The Executive Branch Memorandum flatly states (at 17), "It was clearly understood by both parties that [reprocessing] activities could not occur without U.S. agreement." The problem with this assertion is that it basically depends upon interpretation of "understandings" outside the text and of which there is no public record. Since the text itself is ambiguous, there is absolutely no guarantee against future assertions by the Chinese, in reliance on the various qualifiers in Article 5(2), that they could commence reprocessing in the face of what they would claim to be an improper or unauthorized U.S. objection.

It is likewise of no assistance to the Executive Branch, its claims to the contrary notwithstanding, that the Nuclear Regulatory Commission (the "NRC") has licensed exports under certain pre-1978 agreements with questionable consent clauses (Executive Branch Memorandum at 19-21). It is perfectly understandable that, in passing on export license applications under Section 127 of the Act, the NRC might live with language in agreements pre-dating the NNPA, for in evaluating compliance with licensing criteria, such as the criterion on consent rights found in Section 127(5), the NRC can take into account not just the terms of an agreement for cooperation but other facts and circumstances bearing on the exercise of such rights. The licensing of exports under these pre-1978 agreements scarcely can transform the agreements themselves into precedents for a new agreement which must fully comply with the new requirements embodied in Section 123 as amended by the NNPA. Indeed, the Executive Branch's argument in this regard turns the legislative history of the NNPA on its head. Whatever licensing decisions might be made under older agreements in light of all relevant facts and circumstances, the very purpose of the NNPA was to ensure that new agreements would not repeat the mistakes of the past and, certainly, would not perpetuate the ambiguities found in pre-NNPA agreements.

Furthermore, it is impossible to dismiss the numerous qualifiers found in Article 5(2) of the Agreement, as the Executive Branch Memorandum seeks to do (at 22-25), by simply claiming that these qualifiers don't "mandate" or "compel" a favorable decision on a request to reprocess. To be sure, on their face, they do not. There is an enormous difference, however, between retaining discretion to consider such factors as the United States deems appropriate and writing into an agreement specific factors which the United States must consider. The Agreement, in short, constrains discretion, contrary to the specific intent of the NNPA.

Finally, the successful exercise of consent rights is left to depend very much upon on how the Chinese will interpret the numerous qualifiers in the Agreement. The Executive Branch Memorandum assumes that the Chinese will interpret them in the same way we do. There is no guarantee that this will be the case. See, e.g., Statement of Alan Crane, Office of Technology Assessment, in Hearings on Nuclear Energy Cooperation with China before the Special Subcommittee on U.S.-Pacific Rim Trade of the House Energy and Commerce Committee, 99th Cong., 1st Sess. (September 12, 1985). To the contrary, just as the United States discovered in its protracted disputes with India over the ambiguous provisions in the agreement to supply reactors and fuel for the Tarapur Atomic Power Station, ambiguities and qualifiers in agreements for nuclear cooperation can provide fertile ground for future misunderstandings and disputes. The Chinese, as the Indians before them, may well assert a freedom to reprocess if it appears to them that the United States, in reliance on an interpretation of its rights under Article 5(2) which the Chinese do not accept, is reneging on its obligations under the Agreement.

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Biographical Sketch of Paul Leventhal

Paul Leventhal founded Nuclear Control Institute in 1981 and serves as its President after having worked as a U.S. Senate aide on nuclear power and proliferation issues.

Mr. Leventhal served as Special Counsel to the Senate Government Operations Committee, 1972-1976, and as Staff Director of the Senate Nuclear Regulation Subcommittee, 1979-1981. He was responsible for investigations and hearings and for drafting legislation that led to enactment of the Energy Reorganization Act of 1974, restructuring the Atomic Energy Commission into independent regulatory and promotional agencies, and to enactment of the Nuclear Non-Proliferation Act of 1978, establishing stricter controls to ensure non-military use of U.S. nuclear exports. He also served as Co-Director of the Senate Special Investigation of the Three Mile Island Nuclear Accident in 1979-1980.

Mr. Leventhal was a Research Fellow at the Harvard University Program for Science and International Affairs, concentrating on nuclear-weapons proliferation under a grant from the Ford Foundation in 1976-1977.

Mr. Leventhal served as Assistant Administrator for Policy and Planning at the U.S. National Oceanic and Atmospheric Administration (NOAA) in 1977-1978.

He came to Washington in 1969 to serve as Press Secretary to Senator Jacob K. Javits (R-N.Y.) after nearly a decade of political and investigative reporting for The Cleveland Plain Dealer, The New York Post and Newsday. In 1972, he became Congressional Correspondent for National Journal.

Mr. Leventhal has a bachelor's degree in government, magna cum laude from Franklin and Marshall College and a master's degree from Columbia University Graduate School of Journalism. He is married to Sharon Tanzer Leventhal, an officer of Nuclear Control Institute. They live in Chevy Chase, Maryland, with their sons, Theodore and Joshua.

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The CHAIRMAN. Thank you very much, Mr. Leventhal.
Mr. Luck.

STATEMENT OF EDWARD C. LUCK, PRESIDENT, UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA

Mr. LUCK. Thank you very much, Mr. Chairman.

I very much appreciate this opportunity to testify before this distinguished committee on this very important matter. I will summarize my remarks now and submit the full text for the record.

The CHAIRMAN. Thank you.

Mr. LUCK. I should say at the outset that my views do not necessarily reflect an official position of the United Nations Association of the United States of America [UNA-USA] which is a private, nonprofit, nonpartisan organization dedicated to public outreach and policy research on multilateral issues and institutions.

For many years, UNA-USA has had a major interest in both nuclear nonproliferation and in Sino-American relations.

Given these dual interests, it is particularly gratifying to see the marked change in China's attitude toward nuclear proliferation in recent years, and I would urge Congress not to block the proposed agreement.

In my testimony today, I will briefly address four questions:

One, should China be treated as a special case?

Two, can we have a high degree of confidence that American nuclear transfers to China will not lead to further proliferation?

Three, at this stage, would it be helpful or harmful for the United States to push for further written assurances from China?

And, four, what would be the likely consequences of refusing to accept this agreement?

Regarding whether China is a special case, I would note that as a bilateral accord on nuclear cooperation between the United States and another nuclear weapon state, this agreement is not analogous to past agreements with India or other threshold states.

U.S. legislation, for example, does not require bilateral safeguards on transfers to another nuclear weapons state.

Though China is a large and strategically important country, I do believe that rigorous nonproliferation standards still should apply. China should not be treated as a special case.

In matters of nonproliferation, as in human rights, ultimately it would undermine U.S. policy to adopt a double standard for large and small countries. I am thus reassured that both the administration and Congress have reviewed this proposed agreement thoroughly and conscientiously.

Regarding whether there is sufficient confidence, as has frequently been noted, it would have been preferable in terms of avoiding future misunderstandings if more precise language on safeguards and reprocessing could have been achieved.

At the same time, it should be emphasized that no agreement, no matter how carefully drafted, can provide a 100-percent foolproof guarantee against possible abuse.

In the long run, the nature of Sino-American relations, the extent of United States leverage, China's position in the world, and, most importantly, Chinese motivations and attitudes will be more important determinants than the exact wording of certain clauses of the agreement.

The rate of China's acceptance of nonproliferation norms has been nothing short of breathtaking. Not so many years ago, under Chairman Mao, China repeatedly praised the proliferation of nuclear weapons to the Third World as a means of counterbalancing the nuclear hegemony of the super powers. The Nonproliferation Treaty, the IAEA, and even efforts to achieve a nuclear test ban were treated as means of insuring the dominance of the super powers.

Under Deng Xiaoping's pragmatic leadership, all of this has changed.

In 1979, China took its seat in the Conference on Disarmament in Geneva, and has since espoused an increasingly realistic approach to nuclear disarmament. China now praises the pursuit of a comprehensive test ban in the context of larger nuclear disarmament efforts.

Earlier this year, China said that it would be willing to participate in the committee's ad hoc group on a comprehensive test ban, agreement which itself would be a significant nonproliferation measure.

In January 1984, China joined the IAEA and is about to assume its seat on the agency's Board of Governors.

In September 1984, at its first IAEA general conference, China announced that it would henceforth require IAEA safeguards on all of its nuclear exports. And last month, China announced in the IAEA that it has "decided to voluntarily place some of its civilian nuclear installations under IAEA safeguards."

There can be little doubt that this decision is related to the proposed agreement with the United States.

As in so many other areas of Chinese economic, security, and foreign policy, the strong and consistent pattern toward moderation and the acceptance of international norms and responsibilities stands out.

While China continues to reject the nonproliferation treaty as inequitable, Chinese leaders at the highest levels have repeatedly reiterated Chinese opposition to further proliferation and its determination not to help other countries develop nuclear weapons.

In this regard, special importance should be attached to Premier Zhao Ziyang's statement to the Sixth National People's Congress, since it was intended for a domestic, as well as an international, audience.

While China may have pursued quite different policies in the past, these assurances appear to reflect a deep-rooted shift in Chinese policy, not only in its rhetoric.

If Chinese policy should shift again in the future, which appears most unlikely, there will be opportunities for the United States to react appropriately as each transfer is considered on a case-by-case basis.

There is little point in trying to push for further written assurances, because, as I will argue later, such an effort could well prove counterproductive.

The crucial judgment here concerns Chinese motivations, especially why Chinese negotiators have been unwilling to bend any further. Skeptics have contended that this reflects a hidden Chinese desire to help Pakistan or other threshold states to acquire nuclear weapons. I find this explanation highly implausible.

This line of argument assumes a degree of duplicity that would be both uncharacteristic and ultimately irrational. Why would the Chinese seek nuclear accords with the United States, with its strong record of concern about proliferation, if their intent was to violate both the letter and the spirit of the agreements?

This seems especially unlikely, given the strong Chinese interest in improving cooperation with the United States on a variety of economic, technological, and political fronts.

Step by step, China has adopted most of the international norms and principles related to the nonproliferation regime, and it has done so voluntarily, not in response to direct foreign pressure.

This suggests to me that China, as a large, proud, and nonaligned country, has been careful not to appear to be giving in to the demands of one of the super powers, even as it meets most of these American concerns.

As the Chinese representative to the IAEA was quick to point out a few weeks ago when announcing China's intent to permit IAEA safeguards in some of its nuclear installations:

> I would like to point out with emphasis that this decision of the Chinese Government was made in line with China's independent foreign policy. It is not the result of any bilateral negotiations.

It is no doubt important to China for both domestic and international reasons not to appear to align itself too closely with the United States, especially on a matter as sensitive as nuclear cooperation.

It should be recalled that a major issue in the Sino-Soviet split was the question of nuclear cooperation and the understandable Soviet reluctance to go too far in helping its neighbor acquire nuclear weapons. This experience left a deep scar on Chinese perceptions, making them all the more sensitive to, and perhaps even suspicious of, American pressures in this area.

For these reasons, it is quite likely that congressional rejection of this agreement would be misinterpreted in Beijing. It would be seen as a slap in the face after China has come very far toward meeting legitimate American nonproliferation concerns. It would provide ammunition for those relatively few figures in the Chinese leadership who are still skeptical of the benefits of China's broadening relationships with the West, especially with the United States.

It would strengthen the hand of those who argue that China should go it alone, with as little dependence on the West as possible.

To America's other important friends in Asia, the rejection of this agreement would signify a failure of United States diplomacy and a setback for United States relations in this region. It would be welcomed in Moscow and regretted in Tokyo.

The United States role in Asia has been enhanced in recent years, just as the strategic and economic importance of the region has grown markedly.

The increasing moderation of Chinese domestic and foreign policy has been an important element in this success story. We should welcome these steps, not undermine them by taking actions that could begin to unravel the fabric of economic and political cooperation in East Asia.

Otherwise, some of the dire warnings of the dangers of nuclear proliferation in the region someday might well become self-fulfilling prophecies.

Thank you, Mr. Chairman.

[Mr. Luck's prepared statement follows:]

PREPARED STATEMENT OF EDWARD C. LUCK

I very much appreciate this opportunity to testify in my personal capacity before this distinguished Committee on the proposed US-China Nuclear Cooperation Agreement. My views do not necessarily reflect an official position of the United Nations Association of the USA (UNA-USA), which is a private, non-profit, non-partisan organization dedicated to public outreach and policy research on multilateral issues and institutions. Over many years, UNA-USA has had a major interest in both nuclear non-proliferation and Sino-American relations. Two decades ago, the Association's first policy studies programs dealt with ways of bringing China more fully into the international community and the Association has for several years conducted an unofficial but high-level exchange with the People's Republic of China. The Association conducted an intensive nationwide study of non-proliferation policy in 1983 and 1984, which built on a series of UNA-USA studies predating the conclusion of the Nuclear Non-Proliferation Treaty. Given these dual interests, it has been particularly gratifying to see the marked change in China's attitude toward nuclear proliferation in recent years and I would urge Congress not to block the proposed agreement.

In my testimony today, I will briefly address four questions:

1) Should China be treated as a special case?;
2) Based on this agreement and Chinese policies to date, can we have a high degree of confidence that American nuclear transfers to China will not lead to further proliferation?;

3) At this stage, would it be helpful or harmful for the United States to push for further written assurances from China?; and
4) What would be the likely consequences of refusing to accept this agreement?

A Special Case?

As a bilateral accord on nuclear cooperation between the United States and another nuclear weapon state, this agreement is not analogous to past agreements with India or other threshold states. US legislation, for example, does not require bilateral safeguards on transfers to another nuclear weapons state. Our primary concern in this case should not be so much whether cooperation under the proposed agreement would indirectly enhance China's already ample nuclear capabilities, but whether China will discourage or encourage proliferation on the part of other nations.

Though China is a large and strategically important country, rigorous non-proliferation standards still should apply. China should not be treated as a special case. In matters of non-proliferation, as in human rights, ultimately it would undermine US policy to adopt a double standard for large and small countries. It is thus reassuring that both the Administration and Congress have reviewed this proposed agreement thoroughly and conscientiously.

Sufficient Confidence?

As has been frequently noted, it would have been preferable, in terms of avoiding future misunderstandings, if more precise language on safeguards and reprocessing could have been achieved. At the same time, it should be emphasized that no agreement, no matter how carefully drafted, can provide a one hundred percent foolproof guarantee against possible abuse. I believe that the proposed agreement, when seen in the context of larger developments in Chinese perspectives and policies, provides sufficient reassurance. In the long run, the nature of Sino-American relations, the extent of US leverage, China's position in the world, and, most importantly, Chinese motivations and attitudes will be more important determinants than the exact wording of certain clauses of the agreement.

The rate of China's acceptance of non-proliferation norms has been nothing short of breathtaking. Not so many years ago, under Chairman Mao, China repeatedly praised the proliferation of nuclear weapons to the third world as a means of counterbalancing the nuclear hegemony of the superpowers. The Non-Proliferation Treaty, the International Atomic Energy Agency (IAEA) and even efforts to achieve a nuclear test ban were treated as means of insuring the dominance of the superpowers. Mao belittled the dangers posed by nuclear war, contending that ideological purity and the principles of peoples war would assure that China would survive a nuclear holocaust.

Under Deng Xiaoping's pragmatic leadership, all this has changed. In 1979, China took its seat in the Conference on Disarmament in Geneva, and has since espoused an increasingly realistic approach to nuclear disarmament. China now praises the pursuit of a comprehensive test ban in the context of larger nuclear disarmament efforts. Earlier this year, China said that it would be willing to participate in the Committee's ad hoc group on a comprehensive test ban, which in itself would be a significant non-proliferation measure.

In January 1984, China joined the IAEA and is about to assume its seat on the agency's Board of Governors. In September 1984, at its first IAEA general conference, China announced that it would henceforth require IAEA safeguards on all of its nuclear exports. And last month, China announced in the IAEA that it has "decided to voluntarily place some of its civilian nuclear installations under IAEA safeguards." While the Chinese representative stressed that this step is not tied to any bilateral negotiations, there can be little doubt that this decision is related to the proposed agreement with the United States. As in so many other areas of Chinese economic, security and foreign policy, the strong and consistent pattern towards moderation and acceptance of international norms and responsibilities stands out.

While China continues to reject the non-proliferation treaty as inequitable, Chinese leaders at the highest levels have repeatedly reiterated Chinese opposition to further proliferation and its determination not to help other countries develop nuclear weapons. In this regard, special importance should be attached to Premier Zhao Ziyang's statement to the Sixth National People's Congress, since it was intended for a domestic as well as an international audience. While China may have pursued quite different policies in the past, these assurances appear to reflect a deep-rooted shift in Chinese policy, not only in its rhetoric. If Chinese policy should shift again in the future, which appears most unlikely, there will be opportunities for the US to react appropriately as each transfer is considered on a case-by-case basis.

Should We Push for Further Assurances?

There is little point in trying to push China any further regarding written assurances and, as I will argue later, such an effort could well prove counterproductive. The crucial judgment here concerns Chinese motivations, particularly why Chinese negotiators have been unwilling to bend any further. Skeptics have contended that this reflects a hidden Chinese desire to help Pakistan or other threshold states to acquire nuclear weapons. I find this explanation highly implausible.

This line of argument assumes a degree of duplicity that would be both uncharacteristic and ultimately irrational. Why would the Chinese seek nuclear accords with the US, with its strong record of concern about proliferation, if their intent was to violate both the letter and the spirit of the agreements? This seems especially unlikely given the strong Chinese interest in improving cooperation with the US on a variety of economic, technological and political fronts. This argument is reminiscent of that put forward by those who argued against admitting China to the UN: that China wanted to join the world body in order to undermine it. Neither logic nor experience has supported that contention.

Step by step, China has adopted most of the international norms and principles related to the non-proliferation regime. And it has done so voluntarily, not in response to direct foreign pressure. This suggests that China, as a large, proud, and non-aligned country, has been careful not to appear to be giving in to the demands of one of the superpowers, even as it meets most of these concerns in its own way and at its own pace. As the Chinese representative to the IAEA was quick to point out a few weeks ago when announcing China's intent to permit IAEA safeguards on some of its nuclear installations: "I would like to point out with emphasis that this decision of the Chinese Government was made in line with China's independent foreign policy. It is not the result of any bilateral negotiations."

It is no doubt important to China, for both domestic and international reasons, not to appear to align itself too closely with the United States, especially on a matter as sensitive as nuclear cooperation. It should be recalled that a major issue in the Sino-Soviet split was the question of nuclear cooperation and the understandable Soviet reluctance to go too far in helping its neighbor acquire nuclear weapons. This experience left a deep scar on Chinese perceptions, making them all the more sensitive to, and perhaps even suspicious of, American pressures in this area.

Consequences of Denying the Agreement

For these reasons, it is quite likely that a Congressional rejection of this agreement would be misinterpreted in Beijing. It would be seen as a slap in the face after China has come very far toward meeting legitimate American non-proliferation concerns. It would provide ammunition for those relatively few figures in the Chinese leadership who are still skeptical of the benefits of China's broadening relationships with the West, especially with the United States. It would strengthen the hand of those who argue that China should go-it-alone, with as little dependence on the West as possible.

To America's other important friends in Asia, the rejection of this agreement would signify a failure of US diplomacy and a setback for US relations in this region. It would be welcomed in Moscow and regretted in Tokyo. The US role in Asia has been enhanced in recent years, as the strategic and economic importance of the region has grown markedly.

The increasing moderation of Chinese domestic and foreign policy has been an important element in this success story. We should welcome these steps, not undermine them by taking actions that could begin to unravel the fabric of economic and political cooperation in East Asia. Otherwise, some of the dire warnings of the dangers of nuclear proliferation in the region someday might well become self-fulfilling prophecies.

The CHAIRMAN. Thank you very much, Mr. Luck.

Mr. Van Doren.

STATEMENT OF CHARLES N. VAN DOREN, FORMER ASSISTANT DIRECTOR AND DEPUTY GENERAL COUNSEL, ARMS CONTROL AND DISARMAMENT AGENCY

Mr. VAN DOREN. Thank you, Mr. Chairman.

I, too, will follow the practice of submitting my entire statement for the record and will try to summarize as best as I can because of the late hour.

After expressing my appreciation for your invitation to testify before this committee on this important agreement, my statement notes that the testimony will be primarily from the perspective of one whose major preoccupation over the past 20 years has been preventing the spread of nuclear weapons to additional countries.

My statement tries to look beyond the legal issues, on which you have received copious advice, to some of the underlying policy considerations. It deals with three of the matters that have been raised at the hearing.

Basically, my net conclusion, after examining the agreement and weighing the various issues that have been raised with respect to it, is that I believe this agreement should be promptly brought into force following completion of the requisite Congressional review period.

My first reason is, as I describe in my statement, the marked improvement in China's posture toward nonproliferation in the past few years, including the apparent cessation of assistance it was reportedly giving to Pakistan's efforts to develop a nuclear explosive capability.

While I have no reason to doubt the indications that this assistance has, in fact, ceased, I concede that if you were to conclude on the basis of firm and reliable information not available to me that it had not ceased, my advice would have to be modified.

But, assuming that it has ceased, I note that United States nuclear cooperation with China will provide a continuing opportunity to heighten Chinese awareness of the need to apply the norms that have been developed with respect to safeguards, physical protection, and sensitive nuclear exports, and a tangible stake in complying with those norms.

Second, my statement deals with the absence of explicit provisions in this agreement for safeguards in China with respect to nuclear materials and equipment covered by the agreement. It notes that the Congress must satisfy itself that there will be adequate means of verifying compliance with guarantees against military or explosive use of materials derived from cooperation under this agreement and against retransfers to a third country without U.S. consent.

In this connection, it cites the applicable provisions of the agreement and the recent Chinese offer to accept IAEA safeguards on some of its nuclear facilities, urges the negotiation of the best possible verification arrangements, hopefully including coverage of the United States exports under the Chinese voluntary safeguards offer, and notes that there will be an opportunity to judge the adequacy of those arrangements and verification measures at the export licensing stage.

Third, it deals with the provisions relied upon to meet the statutory requirement for a consent to reprocessing. It says this provision is unique and should remain so, but concludes that it appears tolerable in this case from a policy viewpoint. In that connection, it makes several points which have not been raised in this hearing, and I think I will spell those out a bit.

First, the fact is that it will be at least a dozen, and more probably 15 years—bringing us to the year 2000—before any spent fuel subject to this agreement could be reprocessed, and that the Chinese have stated they have no plans to reprocess for at least 15 years.

Second, it is my understanding that the availability of sufficient weapons usable material is not a pacing item in the Chinese nuclear weapons program and not likely to become one. They already can produce all they may need, and thus denying them the use of U.S.-origin materials would not change the picture. Nor would disapproving this agreement for cooperation, since the only result of that would be that the Chinese would acquire equivalent reactors and nuclear fuel from other suppliers whose agreements do not include consent rights over reprocessing.

Third, the fact is that this agreement does preclude the retransfer of any resulting plutonium to a third state without U.S. consent.

Fourth, as for the fact that the reprocessing of spent fuel derived from cooperation under this agreement would add to the amount of separated plutonium in China potentially vulnerable to theft or seizure by subnational or terrorist groups, I note the agreement's requirements for adequate physical protection of such material, as well as the fact that in view of China's clear ability to obtain equivalent reactors and fuel from other countries, this problem would not be removed by disapproving the entry into force of this agreement. But it would be helpful to urge the Chinese to join the International Convention on the Physical Protection of Nuclear Materials, as both the United States and the Soviet Union have already done. If we enter into this agreement, I think that we will be in a better position to urge them to do so.

With respect to the retransfer to China of spent fuel over which we have consent rights in other countries, the principal governing instrument will not be this agreement but our agreements for cooperation with those other countries, which require our consent to any such retransfer. This would give us the legal ability to condition such consent on no reprocessing of such spent fuel or on stringent precautions with respect to any such reprocessing.

Admittedly, the circumstances I have described in this statement could be different by the year 2000. But any long-term agreement for cooperation requires a leap of faith, based on the best information available at the time it is entered into. In this case, I think that leap is, on balance, worth taking, with the understanding that the extent of actual cooperation under this agreement will be affected by U.S. assessments at the export licensing stage of the continuing validity of the premises on which approval of this agreement is based.

Mr. Chairman, I would like to add two brief, additional comments that were not in the prepared statement I submitted earlier this week, because they relate to what has happened since then.

First, with respect to Professor Copper's warnings about the Chinese not living up to their agreements, I would just call attention to the more favorable assessment of the prospects on that score given in testimony by the chief of the Far Eastern Law Division of the Library of Congress in testimony on this agreement before the Committee on Energy and Commerce of the U.S. House of Representatives, which I am sure you could easily obtain. A memorandum by that witness is attached to the prepared statement of Senator Proxmire in today's hearing.

Second, and this is the only really new item, I would like to comment very briefly on the new legislation that was introduced this morning—the Glenn-Roth bill.

To the extent that it is intended to help insure that the use of diplomatic channels to establish mutually acceptable verification arrangements as provided in this agreement will result in adequate verification arrangements before significant shipments are made under this agreement, I share the objective of that bill, as you can tell from my earlier remarks.

But the other assurances it calls for seem to me unrealistic to expect the President to be able to obtain from the Chinese, and making them a precondition of actual cooperation under this agreement is likely to make the agreement a nullity.

Having concluded protracted negotiations on the formulation of United States consent rights over reprocessing, the Chinese are most unlikely to bow to a United States demand that they issue a supplementary gloss on it which would be tantamount to reopening the negotiations. They are likely to say, as Robert Frost did, when asked what one of his poems meant, "If we could have said it any better, we would have.

With respect to the demand for a public, written, detailed statement of China's nuclear nonproliferation policies, while I would welcome a confirmation of the United States notes that have been supplied to this committee, I assume the Chinese will point out the public statements they have made over the past 2 years, including the report approved by the People's National Congress, which I understand gives it the force of law in China, and they would probably reject the United States demand for a more extensive written policy statement of a type which we have not demanded from other nuclear trading partners, such as France. Instead, we should keep a watching brief on their nonproliferation actions, which will affect future U.S. decisions about actual transactions under this umbrella agreement.

Finally, with respect to the relationship of this agreement to future legislation, I would like to take note of the points that Mr. Matheson made in his testimony this afternoon, and say that I think the further assurance demanded in the Glenn-Roth bill on this point is both unnecessary and most unlikely to be obtainable.

In sum, I have serious reservations about enactment of the Glenn-Roth bill in its present form, but I would recommend that this committee approve the agreement's entry into force.

Thank you very much, Mr. Chairman.

[Mr. Van Doren's prepared statement follows:]

PREPARED STATEMENT OF CHARLES N. VAN DOREN

Mr. Chairman:

I appreciate your invitation to testify before this Committee on the U.S.-China Agreement for Cooperation. I shall do so from the perspective of one whose major preoccupation over the past twenty years has been preventing the spread of nuclear weapons to additional countries, and who had important responsibilities for that subject in the previous Administration.

After examining the agreement and weighing the various issues that have been raised with respect to it, I believe this agreement should be promptly brought into force following completion of the requisite Congressional review period.

My first reason for this conclusion relates not so much to the terms of the agreement itself, but to the significant progress that appears to have been made in connection with the negotiation of this and other recent agreements for peaceful nuclear cooperation with China, toward bringing the Chinese into the international non-proliferation regime.

Until the last few years, China was a source of concern to those of us trying to curb proliferation. It was unsupportive of non-proliferation efforts; had begun making unsafeguarded nuclear exports to countries of particular concern; posed a growing risk of undercuting the guidelines for nuclear exports that had been worked out by the major nuclear supplier countries; and reportedly gave some assistance to Pakistan's efforts to develop a nuclear weapons capability.

The marked improvements in China's posture on this subject that appear to have occurred in the past few years are among the most encouraging developments in the non-proliferation field. China has:

- joined the IAEA;
- announced its opposition to proliferation, and indicated its readiness to apply generally accepted nuclear export norms;
- adopted a new policy of requiring IAEA safeguards on all its nuclear exports to non-nuclear-weapon states, and entered into agreements with Japan, Argentina, Brazil, the United Kingdom and the Federal Republic of Germany which require it to do so with respect to nuclear equipment or materials covered by those agreements;
- made a voluntary offer to accept IAEA safeguards on some of its nuclear facilities; and
- apparently terminated assistance to Pakistan in developing a nuclear explosive capability.

On the last point -- which is of special importance -- I do not have access to the classified information made available to the Congress or applicable intelligence reports, but am basing my conclusion on the unclassified record and inferences therefrom. If, on the basis of other firm and reliable evidence you determine that this conclusion is wrong, my advice would have to be modified.

The relationship of the foregoing considerations to this Agreement for Cooperation is that U.S. nuclear cooperation with China will provide a continuing opportunity to heighten Chinese awareness of the need to apply the norms developed with respect to safeguards, physical protection of nuclear materials and facilities, and sensitive nuclear exports, and a tangible stake in complying with those norms.

Turning now to the agreement itself, the two principal issues to be addressed are its lack of provision for explicit safeguards rights in China on nuclear materials subject to the agreement, and its unique provisions with respect to U.S. consent over the reprocessing of such materials.

On the safeguards issue, it clearly would have been better if we could have obtained such safeguards provisions (which were obtained in China's recent agreements for cooperation with Japan, Argentina and Brazil) for two reasons:

1. As a means of helping to verify compliance with the guarantees in the agreement that nuclear materials subject to the agreement:

    - will not be used for any military or explosive purpose; and

    - will not be transferred to any other country without U.S. consent; and

2. For its symbolic value in minimizing the differences in the treatment of nuclear-weapon states and non-nuclear-weapon states under the non-proliferation regime.

On the first score, Congress must make a judgment as to whether, without more explicit provisions in this agreement for safeguards rights, it will have adequate assurance that these guarantees - on which the legal authority to enter into this agreement is based - are being fulfilled.

On the second score, it is clear that safeguards in nuclear weapon states are not legally required by the Non-Proliferation Treaty, that they would not serve the same function as safeguards in non-nuclear-weapon states, and that they obviously could not affect the fact that China is a nuclear weapon state. But their omission in this case could add to the difficulty of our efforts to persuade non-nuclear weapon states to accept full-scope safeguards.

In response, the Administration has pointed out, inter alia, that:

- the agreement contains provisions for on-going consultation, at the request of either party, regarding its implementation and other matters of concern;
- the agreement provides that, in order to ensure that the provisions are effectively carried out, the parties will use diplomatic channels to establish mutually acceptable arrangements for exchanges of information and visits to material, facilities and components subject to the agreement; and
- the agreement provides that the parties shall exchange views and information on the establishment and operation of their respective national accounting and control systems for nuclear materials subject to the agreement;

and notes the recent offer of the Chinese to accept IAEA safeguards on some of its nuclear facilities (which helps meet the need to minimize differences in treatment under the non-proliferation regime and, conceivably, could be applied to the materials derived from cooperation under this agreement).

It also points out that any significant shipments of nuclear materials or equipment would be subject to export licensing, at which time the adequacy of the verification arrangements that will have been worked out can be judged. These points should be given due weight.

Thus, while I regret that the Chinese did not accept more explicit safeguards provisions in this agreement, I believe that if the agreement comes into force the U.S. will still have an opportunity to work out specific verification arrangements before any significant shipments pass under the agreement, and to judge the adequacy of those arrangements at the export licensing stage. I hope these arrangements will bring any nuclear materials derived from cooperation under this agreement within the coverage of the Chinese voluntary safeguards offer. I assume that this Committee will ensure that it is kept fully and currently informed on the evolution of such arrangements, as well as on the question of Chinese adherence to its annoucned non-proliferation policies.

In any event, this agreement will enable us to ensure that no retransfer by China of any nuclear materials or equipment covered by it will be made to any non-nuclear weapon state without being covered by IAEA safeguards and adequate physical protection arrangements. Our ability to ensure this is clear from the provision requiring U.S. consent to any retransfer of such equipment or material to a third country. Our obligation to make our consent conditional on the fulfillment of those conditions is equally clear.

The other major issue raised by the text of this agreement relates to the provisions relied upon to meet the statutory requirement that spent fuel derived from U.S. exports will not be reprocessed without U.S. consent. This provision is unique, and hopefully will remain so, since it has raised a number of questions of interpretation. But the following considerations lead me to conclude that it is tolerable in this case:

1. The fact that it will be at least a dozen and more probably 15 years (bringing us up to the year 2000) before any spent fuel subject to this agreement would be available for reprocessing; and that the Chinese have stated they have no plans to reprocess it for at least 15 years.

2. My understanding that the availability of sufficient weapons-usable material is not a pacing item in the Chinese nuclear weapons program and not likely to become one. They already have the ability to produce all they may need, and thus denying them the use of U.S.-origin materials would not change the picture. Nor would disapproving this agreement for cooperation since the only result of that would be that the Chinese would acquire equivalent reactors and nuclear fuel from other suppliers whose agreements do not include consent rights over reprocessing.

3. The fact that the agreement precludes the retransfer of any resulting plutonium to a third state without U.S. consent.

4. As for the fact that the reprocessing of spent fuel derived from cooperation under this agreement would add to the amount of separated plutonium in China potentially vulnerable to theft or seizure by subnational or terrorist groups, I note the agreement's requirements for adequate physical protection of such material, as well as the fact that in view of China's clear ability to obtain equivalent reactors and fuel from other countries, this problem would not be removed by disapproving the entry into force of this agreement. But it would be helpful to urge the Chinese to join the international Convention on the Physical Protection of Nuclear Materials, as both the United States and the Soviet Union have already done.

5. With respect to the retransfer to China of spent fuel over which we have consent rights in other countries, the governing instrument will not be the U.S.-China agreement but our agreements for cooperation with those other countries, which require our consent to any such retransfer. (This would give us the legal ability to condition such consent on no reprocessing of such spent fuel, or on stringent precautions with respect to any such reprocessing).

Admittedly, the circumstances I have described in this statement could be different by the year 2000. But any long-term agreement for cooperation requires a leap of faith, based on the best information available at the time it is entered into. In this case, I think that leap is, on balance, worth taking, with the understanding that the extent of actual cooperation under this agreement will be affected by U.S. assessments at the licensing stage of the continuing validity of the premises on which approval of this agreement is based.

Thank you, Mr. Chairman.

BIOGRAPHICAL DATA
ON
CHARLES N. VAN DOREN

Mr. Van Doren served as Assistant Director of the U.S. Arms Control and Disarmament Agency from 1977-1981, heading its Non-Proliferation Bureau. Throughout his 19-year career at ACDA (which also included 8 years as its Deputy General Counsel), Mr. Van Doren specialized in non-proliferation and related nuclear export matters. He participated in the negotiation of the Non-Proliferation Treaty, its presentation to the Senate, and in all subsequent phases of its implementation, including service as Alternate U.S. Representative to both the 1975 and 1980 NPT Review Conferences. He was a member of the U.S. delegation to the IAEA Safeguards Committee, which developed the guidelines for safeguards agreements under the NPT. He played a leading role in the policy review that led to the formation of the Nuclear Suppliers' Group and in the negotiation of the Nuclear Suppliers' Guidelines, and participated in all subsequent interagency policy reviews of the subject until his retirement in 1981. Since then, he has worked as a writer, teacher and consultant in the field, including service as Executive Director of New Approaches to Non-Proliferation, Adjunct Professor of Law at the Georgetown University Law Center, and and a consultant to the Arms Control Association, the Congressional Research Service, the National Academy of Sciences, the Georgetown Center for Internatioanl and Strategic Studies, the Carnegie Endowment, and International Energy Associates Limited. Publications include:

Israel, Iraq and the Middle East Proliferation Problem (The Arms Control Association, 1981)

Toward an Effective International Plutonium Storage System (Congressional Research Service, 1981)

Nuclear Supply and Non-Proliferation: The IAEA Committee on Assurances of Supply (Congressional Research Service, 1983)

"Strategic Planning on Legal and Institutional Barriers to Proliferation," in William J. Taylor et al. (editors) *Strategic Responses to Conflict in the 1980's* (Lexington Books, 1984)

He also helped draft the chapter on "Non-Proliferation" in *Nuclear Arms Control: Background and Issues* (National Academy of Sciences, 1985)

The **Chairman**. Thank you very much, Mr. Van Doren.

Let me ask Professor Copper and Mr. Leventhal the question raised by the testimony of the final two witnesses, Mr. Luck and Mr. Van Doren. Essentially one of the points that each of the latter two witnesses made is that China would do business with someone else in the event that we do not have an agreement.

Does this concern either of you? Do the commercial aspects of this have really any weight in your judgment as the committee takes a look at it?

Professor.

Mr. **Copper**. I certainly do not want to imply that I am discouraging American companies from doing business abroad and trying to export. Certainly we need that. But I don't think it would be the same thing, or in fact easy, for China to purchase nuclear technology and the equipment for nuclear plants somewhere else. If China tries to purchase from other countries, technology which we have provided to other countries which they in turn would try to buy, would be blocked by agreements we have with those countries. In addition, purchasing from the United States or getting nuclear technology from the United States certainly is more prestigious for them. It certainly gives them a reputation in terms of their diplomacy that they would not get by purchasing from some other country.

Mr. **Leventhal**. I would respond, Mr. Chairman, by saying that over a number of years, the competitive zeal in the nuclear marketplace has tended to cause a ratcheting down of the nonproliferation standards that apply to the transactions. My deepest concern about the China agreement as we have it before us is that it represents the best, presumably, that United States negotiators could get in the face of a clear desire by the United States nuclear industry to break into the China market.

I do not believe that the only way or that the best way we can influence China's nuclear policies is to trade with them. It may well be, in fact, that we could do better, as I indicated at the end of my statement, by keeping a safe distance and by seeking to influence them by other means which, in fact, may be more influential.

My feeling is that nuclear commerce is not necessarily the best means to influence nuclear nonproliferation behavior. There are other elements of a bilateral relationship with nations that could be far more influential if conducted privately and with clarity.

I am concerned by the lowest common denominator effect that appears to result from the desire to lock in a customer before another country does, and I am deeply concerned, and that is what is at play here. I think much of the lobbying, both within the administration and within Congress, on this particular transaction or on this agreement has come from Westinghouse and other vendors who have a keen interest in making the sales.

The **Chairman**. I suspect that you are correct that there are persons who want to make sales who are interested in this agreement. But, of course, a considerable amount of argumentation in favor of this is coming from the U.S. Government, at least from the administration. which feels that any leverage that we have along the lines of improving China's nuclear practices comes from the fact that we are involved in this business. In the event that China was doing business only with other countries, it would have no need to be bothered one way or the other by U.S. views on the subject we are discussing today.

How would you respond to that?

Mr. **Leventhal**. I did not quite hear the very end of your question.

The **Chairman**. You suggested that sometimes trading is not the only way to influence policy, and I would agree with that. But I am not certain what our influence is outside of trading in this particular regard. In other words, in the event that whatever the Chinese wanted was obtainable from another source and all conversations then proceeded outside of our arena, where does the leverage come?

Mr. **Leventhal**. I think the leverage could come with the range of bilateral interests that China and the United States have in dealing with one another on a number of issues and a number of interests.

I would like to also point out that if, in fact, China was as interested as it appears to be in obtaining U.S. technology, perhaps we were in more of a position to take a tougher line in our negotiations with China, particularly on issues of safeguards and consent rights.

It does appear that the first choice of the Chinese is to obtain Westinghouse technology. That should have given us the ability, I believe, to have obtained a stronger agreement than we, in fact, have. But I also do not believe that we should be driven by the threatened loss of sales here. This is not the be-all or the end-all. If this agreement were rejected, we obviously would have to explain why, and that would provide the basis for reopening negotiations.

I just simply do not accept that we should accept an inferior nonproliferation product in the interest of establishing a commercial relationship in this area.

The **Chairman**. Did you have a further comment, Professor?

Mr. **Copper**. Yes. I would like to make another comment, please.

I think we have considerable leverage over the People's Republic of China at the present time.

As I mentioned, of the export licenses for high technology that go to Communist countries, China is the recipient of 75 percent of them. They are the benefactor of $2 to $3 billion of economic assistance from international organizations, of which we pay one-fourth, and a good portion of that is in soft loans, of which 80 to 90 percent is really a gift and not a loan. It does not have to be repaid in constant dollars.

Also, we have invested heavily in China—1 to 2 billion dollars' worth. I think that when you look at that investment, you should consider Japanese and European investment there also, which would not be there, certainly not in the amount that it is, were it not for the United States lead. Other countries follow us in terms of where we invest. And they are going to China and not to the Soviet Union. Japanese investment is going to China and not to Siberia.

I think that is because of our good relations with the People's Republic of China.

Finally, we are buying a considerable amount of goods from China which we do not need and which we could buy from other developing countries. But we are instead buying from China.

I think all of that gives us considerable leverage in dealing with Beijing. I think the reason our relations with the People's Republic of China are very good now can be explained generally on that basis, and probably not very much on the basis that they personally like the present administration or someone in the White House.

The **Chairman**. Gentlemen, we have had testimony before with regard to the Chinese grain relationship. This has turned out to be a less than satisfactory agreement, in which the Chinese had said they would purchase a certain amount of grain from us and have come up short.

One can ask why, and the answer is they are doing better in growing grain now, and do not see a need to fulfill their contract. They have argued also about the amount of spoilage and the quality of the grain, and various other technical arrangements. But these are difficult things to assess.

Clearly the committee is attempting to take a look both at the safeguard aspects as well as the commercial arrangements that we have. We must also consider our overall relationship evolving with this very important country in the world.

We appreciate your coming today. Your views will be a part of the consideration of each member and will make a more complete record as we evaluate all of what has been said.

Thank you very much for coming.

This hearing is adjourned.

[Whereupon, at 5:07 p.m., the committee adjourned subject to call of the Chair.]

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